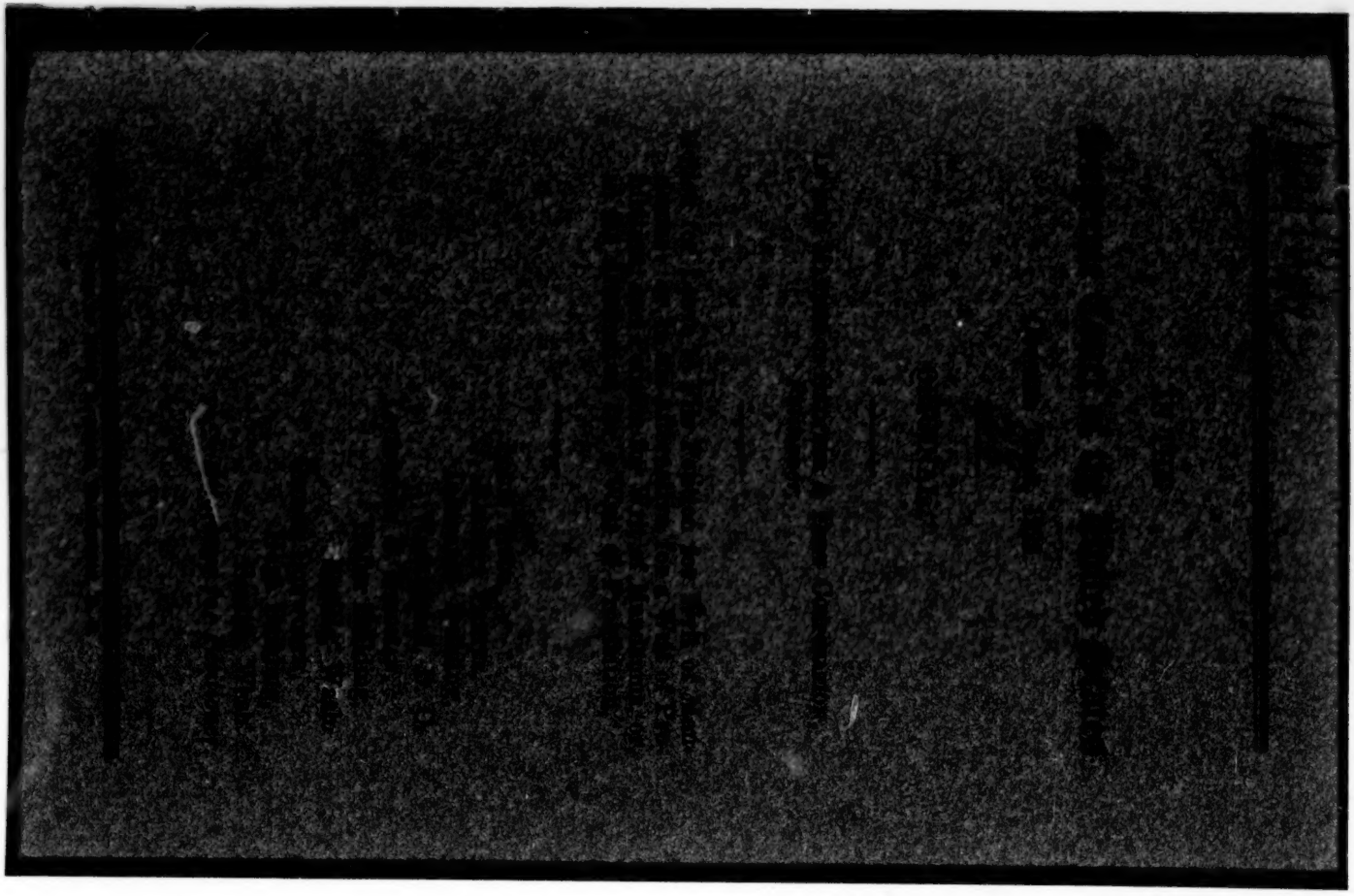

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

ORIGINAL.

IN THE MATTER OF SKINNER & EDDY CORPORATION,
Petitioner.

Motion for Leave to File Petition for Writ of Mandamus; or, in the Alternative, for a Writ of Prohibition.

And now comes Skinner & Eddy Corporation, by its attorneys, and moves for leave to file the petition hereto annexed for a writ of mandamus, or in the alternative, for a writ of prohibition, and that a rule be entered and issued directing the Honorable the Chief Justice and the Associate Judges of the United States Court of Claims to show cause why a writ of mandamus, or, in the alternative, a writ of prohibition, should not issue against them in accordance with the prayers of the said petitioner and why said petitioner should not have such other and further relief in the premises as may be just and meet.

LOUIS TITUS,
J. BARRETT CARTER,
LIVINGSTON B. STEDMAN,
GEORGE DONWORTH,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

In the Matter of SKINNER & EDDY CORPORATION,
Petitioner.

Original.

To the Honorable the Chief Justice and to the Associate Justices of the Supreme Court of the United States:

The petition of Skinner & Eddy Corporation, a corporation of the State of Washington, for a writ of mandamus, or, in the alternative, for a writ of prohibition, directed to the Honorable the United States Court of Claims, requiring that court:

To restore to full force and effect an order of dismissal made on April 30, 1923, in the case of Skinner and Eddy Corporation *vs.* United States, 199-A, which order of dismissal was made on the motion of the petitioner here, who was the plaintiff in that case, and further requiring said court to set aside an order made November 28, 1923, vacating said order of dismissal of April 30, 1923, and reinstating said cause for the purpose of enabling the United States to file a counter-claim against petitioner in the sum of $9,275,148.03, and further requiring said court to desist from the further attempted exercise of jurisdiction in said case.

Said reinstatement was made without the consent and against the objection of petitioner, and said counter-claim was allowed to be filed after petitioner

had ceased to be an actor in said court, and notwithstanding the fact that after the dismissal of said case and before its purported reinstatement, petitioner had brought suit (now still pending) against the United States Shipping Board Emergency Fleet Corporation in another court for a large part of the items claimed in the petition in said case, as grounds of recovery against the United States, the pendency of which later suit prevents petitioner from prosecuting said case in the Court of Claims. (Judicial Code, Section 154; 36 Stat. L. 1138.)

The effect of the said action of the Court of Claims is to require petitioner (a) to remain in said court as to a cause of action which it has dismissed, and which it is barred from prosecuting, and (b) to defend and litigate in the Court of Claims an alleged affirmative cause of action in favor of the United States, as to which the Constitution of the United States guarantees to petitioner a right to trial by jury:

Said petitioner respectfully shows:

I.

On June 15, 1921, your petitioner, Skinner and Eddy Corporation, began suit against the United States in the United States Court of Claims by its petition, in due form, filed in said court on said date. A full copy of said petition in the United States Court of Claims is filed and presented as an exhibit to this present petition, the same being separately bound, and entitled, "Petitioner's Exhibit D-Volume I."

In said petition in the United States Court of Claims, your petitioner alleged that by reason of certain contracts made between said petitioner and the United States Shipping Board Emergency Fleet Cor-

poration, (mentioned in the petition as representing the United States), said petitioner became entitled to receive and recover from the United States the sum of $24,167,389.55, less credits and offsets specified in said petition in the amount of $6,673,900.58, leaving a balance due petitioner, exclusive of all just credits and offsets of $17,493,488.97, for which last-named sum petitioner prayed judgment against the United States. The nature and character of the items making up the said amounts so sued for are more particularly set forth in paragraph XI of the present petition.

II.

Thereafter, to wit, on April 11, 1923, and before any evidence had been taken or any proceedings had in said case, except the filing of a general traverse, your petitioner duly filed in the Office of the Clerk of said Court of Claims its motion in due form to dismiss said suit without prejudice, a copy of said motion appearing at page 4 of Volume II of Exhibit "D" to this petition. At the time of filing said motion, namely, April 11, 1923, your petitioner also presented to the Clerk of said Court, with a request for the filing thereof, a præcipe for dismissal, entitled in said Court and cause and reading as follows:

> "Dismissal of Action. The above entitled action is hereby dismissed and the Clerk of said Court is instructed to enter dismissal of record. J. Barrett Carter, attorney for petitioner. Louis Titus of Counsel."

Said præcipe does not appear in the copy of the record of said cause, except in the affidavit of Louis Titus filed therein (see page 37 of Volume II of Ex-

hibit D), for the reason that the Clerk of said Court of Claims refused to enter the same as filed in said Court.

III.

At the time of the filing with the Clerk of said Court of said motion to dismiss and the tender of said præcipe for dismissal to the Clerk of said Court for filing, the United States of America, the defendant in said cause, had not made or filed in said cause any answer, setoff, counter-claim cross petition, or other pleading. Under Rule 34 of said Court of Claims, the Clerk of said Court on August 15, 1921, (being at the expiration of sixty days from the date of the filing of said petition), had entered in said cause a general traverse of the petition on behalf of said defendant. No other pleading or paper of any kind was filed in said cause by the defendant, the United States of America, prior to the filing of claimant's motion to dismiss and præcipe for dismissal on April 11, 1923.

IV.

On April 12, 1923, said defendant, the United States, having received service of claimant's motion to dismiss, filed in said Court of Claims its motion "for an order granting to it the right to withdraw its general traverse heretofore filed in this cause and to file its answer and cross bill," a copy of which appears at page 7 of Volume II of Exhibit D to this petition. Thereupon in due course, an order of said Court of Claims was made, setting down for hearing for April 23, 1923, claimant's motion to dismiss and defendant's motion to withdraw the general traverse, and for a "grant of the right" to file answer and cross bill.

V.

On said April 23, 1923, the said motions were argued and submitted in said Court of Claims and on April 30, 1923, said Court of Claims duly made and entered its order, dismissing said cause, said order being in the words following to wit:

> "It is ordered by the Court, on plaintiff's motion therefor, that the plaintiff's petition be, and the same is, dismissed."

VI.

Notwithstanding said petitioner's election and motion to dismiss said cause and notwithstanding that the said cause was in fact dismissed by said Court of Claims on April 30, 1923, said Court of Claims is now attempting and proceeding to entertain jurisdiction of said cause and to permit said defendant, the United States, to file in said cause and to wage against petitioner therein its alleged counter-claim praying for judgment against petitioner in the sum of $9,275,148.03; and said Court has declared its intention to allow said counter-claim to be heard and determined and also to require petitioner to wage in said Court of Claims the matters and things alleged in said petitioner's original petition in said cause; all to the manifest wrong and injury of said petitioner and its great and irreparable loss and damage. In announcing its determination to hear and determine said petition and said alleged counter-claim, said Court of Claims on November 28, 1923, made and filed its opinion and order in said cause, (appearing in full at page 51 of Volume II of Exhibit D to this petition) in which opinion and order it is concluded and directed as follows:

"That order" (meaning the order of April 30, 1923, dismissing said cause as hereinbefore set out) "will be vacated and another order entered overruling the motion to dismiss, and allowing the Government to file its counter-claim"

VII.

In dismissing said cause, said petitioner had no thought or intention to forestall any setoff, counter-claim, or other cross petition by the United States. The reasons actuating said petitioner in dismissing said cause were the following:

1. Said petitioner was advised and believed, and is still advised and believes, that it had the right to dismiss said cause of its own motion without assigning any reason whatever.

2. At the time said cause was begun on June 15, 1921, said petitioner was advised and believed that the proper forum and method for asserting claims arising out of contracts with the United States Shipping Board Emergency Fleet Corporation, was in the Court of Claims by suit against the United States. It was not until May 1, 1922, when the Supreme Court of the United States decided the Sloan and Astoria cases against the United States Shipping Board Emergency Fleet Corporation, 258 U. S. 549, that petitioner could know authoritatively that suits on such contracts could be maintained against the Fleet Corporation. The decision in the Sloan and Astoria cases was a most material fact, occurring after the commencement of said cause in the Court of Claims, and in view of the doubt and uncertainty theretofore prevailing, petitioner should not be held to a course of action adopted at a time when serious doubt prevailed on said subject among lawyers and judges. The decisions of the

lower courts reviewed and reversed in the Sloan and Astoria cases were to the effect that the contractor's remedy was by suit in the Court of Claims against the United States.

3. It was not until April 9, 1923 (when the Supreme Court of the United States decided the case of Russell Motor Car Co. *vs.* the United States, 261 U. S. 514), that petitioner could authoritatively know that the Act of June 15, 1917, (40 Stat. L. 183) relating to the cancellation of contracts and making just compensation therefor, applied to contracts of the United States, and further that the cancellation of such contracts cut off and defeated the claims of contractors for the profits which they would have realized if they had been permitted to fulfill such contracts, and that the remedy for such cancellation was a suit for just compensation as provided in said statute. The importance of this consideration is seen in the fact that the greater part of the amount for which judgment is prayed by petitioner in the Court of Claims is for profits petitioner would have made had the contracts been completed. There are also other items which, in a suit against the United States, should properly be claimed as "just compensation" for the cancellation of said contracts, a total of which items, together with the claim for anticipated profits, represents more than the total amount for which judgment was demanded by petitioner in the said suit in the Court of Claims. As it is settled that petitioner cannot recover anticipated profits, and as it cannot recover just compensation in this suit because prematurely filed, as will hereinafter appear, it follows that petitioner cannot recover any affirmative judgment whatever in said action.

4. Two months before petitioner's suit was begun in the Court of Claims, namely, on April 4, 1921, that court had filed its decision in the case of College Point Boat Corporation *v.* The United States, (see Exhibit A to this petition) in which that court held that upon cancellation of a contract between the Boat Corporation and the Navy Department (the contract having been made on October 25, 1918, and cancellation having been made by the Navy Department on February 26, 1919), the contractor was entitled to recover anticipated profits, the cancellation being treated like any other breach of contract. This decision was relied upon by petitioner in filing said suit in the Court of Claims on June 15, 1921, because it held (a) that a cancellation of such a contract was a breach, and (b) that the United States was liable in damages for such breach. However, the decision of the Court of Claims in the College Point case was not allowed by that Court to stand, but was later entirely withdrawn and does not appear in the published reports of the Court of Claims.

It was not until January 9, 1922, as petitioner is informed and believes, when the Court of Claims decided the case of Meyer Scale Company *v.* United States, 57 Ct. Cls. 26, that that court announced the holding that there could be no recovery of anticipated profits in the case of cancelled contracts. In that case the Court of Claims said, as reported in 57 Ct. Cls. at page 51:

> "The question here decided was presented in College Point Boat Corporation *v.* United States, decided April 4, 1921, and it is now said that although there presented by the defendant, we rendered judgment for the plaintiff without dignifying the point by discussing it. Under the facts

> of that case we found it possible to determine the rights of the parties as we saw them without considering or deciding this question, and as to it we cannot consent to be committed by that case."

And, on June 26, 1922, in Russell Motor Car Co. vs. United States, 57 Ct. Cls. 464, the Court of Claims said at page 496:

> "It is noted that plaintiff requests reconsideration of our conclusions in the *Meyer Scale case* and a following in this case of the holding in *College Point Boat Corporation,* theretofore decided. Counsel was probably not aware of the fact that the conclusions and judgment in the last named case had been set aside and that the rule of the *Meyer Scale case,* restated here, is the rule of this Court."

See footnote published in 57 Ct. Cls. at page 51, regarding the setting aside of the decision in the College Point Boat case.

In bringing its said suit in the Court of Claims said petitioner was induced so to do by the holding of the Court of Claims in said College Point case which was not set aside until more than six months after petitioner began said suit.

5. As petitioner is now advised and believes, its said suit in the Court of Claims, if continued and prosecuted therein, will necessarily fail in its entirety for the reason that anticipated profits cannot be recovered and as to just compensation the suit is prematurely brought. This is the ground particularly mentioned by petitioner in its motion to dismiss as presented to the Court of Claims. Under the Act of June 15, 1917, 40 Stat. L. 183, suit for just compensation against the United States can only be maintained *after*

an ascertainment of the just compensation has been made by the President. When such compensation has been determined, the claimant may accept 75 per cent of the amount of the award and sue for such further sum as he claims to be just. The award of the proper governmental agency is, however, a condition precedent to the suit.

The Act of June 5, 1920, 41 Stat. L. 989, provides that the Shipping Board shall be the agency to determine the just compensation in the case of contracts made by the Fleet Corporation. Petitioner's petition in the Court of Claims does not allege any filing of the claim with the Shipping Board or any action of that Board thereon. In fact, it appears by the affidavits filed in the Court of Claims that petitioner's claim was filed with the Shipping Board in March, 1922 (long after petitioner's suit was begun in the Court of Claims), and no award of just compensation for the cancellation of petitioner's contracts was made by that Board until February 14, 1923. (See affidavit of Louis Titus, page 30 of Volume II of Exhibit D to this petition.) It is obvious that the Court of Claims cannot in the action began by petitioner on June 15, 1921, award just compensation for the cancellation of petitioner's contracts, when the award of compensation by the Shipping Board took place after the commencement of the suit in the Court of Claims. No cause of action for such just compensation existed when petitioner began suit on June 15, 1921.

6. Though petitioner's general claim, substantially as set forth in its petition in its suit begun thereafter against the United States in the Court of Claims, was presented in unverified form to the Auditor for the

State and other Departments on December 28, 1920, petitioner in that claim was seeking anticipated profits as well as payment for work done and materials furnished, and was not asking just compensation for the cancellation of contracts, and no action was taken on said claim up to the time that petitioner began suit in the Court of Claims or thereafter. The facts are set forth in the affidavit of Louis Titus, page 30 of Volume II of Exhibit D to this petition. Said presentation to the Auditor could have no effect upon the right to maintain said suit in the Court of Claims for just compensation, since the determination of the amount of just compensation by the Shipping Board was by the Statutes of June 5, 1920 (41 Stat. L 989) and June 15, 1917 (40 Stat. L 183), made a condition precedent to suit.

7. As to all items claimed upon in the Court of Claims, except such items as should properly be included in a claim for just compensation, it follows from the decision in the Astoria case, 261 U. S. 514, that the proper defendant is the United States Shipping Board Emergency Fleet Corporation, in a suit brought in some court of general jurisdiction where said corporation may be found, and petitioner has the right (which it has now exercised) to bring suit for said items against said Fleet Corporation, the defendant which the Supreme Court holds is liable and suable for breach of such contracts as those made by it with petitioner, and petitioner cannot be compelled to take the unnecessary hazard of trying to hold the United States therefor.

VIII.

Petitioner's suit in the Court of Claims having been dismissed by order of that court on April 30, 1923, petitioner on the following day, namely, on May 1, 1923, filed suit against the United States Shipping Board Emergency Fleet Corporation in the State Court of Washington, at Seattle, Washington, for many of the items for which suit had been brought in the Court of Claims, namely, for all of said items except the claim for anticipated profits,—the amount claimed in said suit at Seattle being $9,129,401.14. On the same day that suit was filed in the State Court at Seattle, service was had on the Fleet Corporation in accordance with the provisions of the State statute, and on May 7, 1923, said Fleet Corporation appeared specially in said State Court and filed its petition to remove said cause to the United States District Court for the Western District of Washington, Northern Division, holding its terms at Seattle, and an order of removal was made accordingly and the cause transferred to the United States District Court.

On June 29, 1923, said Fleet Corporation, claiming to appear specially in said cause, moved the Court to quash and set aside the service of summons in said cause on the ground that said Fleet Corporation was not engaged in business in the State of Washington and could not be sued there. Said motion to quash and set aside the service was duly heard, and on November 23, 1923, the presiding justice made and filed his decision and order, denying the motion of the Fleet Corporation to quash said service and holding said service to be valid. A certified copy of said decision and order of the District Judge are attached to this petition and

made a part hereof as Exhibits B and C. The said cause is still pending in said United States District Court for the Western District of Washington, Northern Division, and the defendant Fleet Corporation is now required to answer said suit.

At the time action was brought against the Fleet Corporation in the State Court at Seattle, there was no action pending in any court for or against said petitioner on account of any of the matters growing out of any of said contracts or claims.

IX.

The proceedings of said Court of Claims, subsequent to its dismissal of said cause on April 30, 1923, and which have led up to the attempt on the part of said court again to exercise jurisdiction thereof and to require said petitioner's attendance in said court and cause, are as follows, as petitioner is advised by its counsel in said cause, and as appears from a certified copy of the proceedings in said court filed herewith as Exhibit D (separately bound in two volumes) to the present petition, namely:

On June 9, 1923 (being 40 days after the dismissal of said cause in said Court of Claims and being thirty-nine days after said petitioner's said suit against the Fleet Corporation had been begun in Seattle, and being 33 days after said Fleet Corporation had filed in the State Court at Seattle its petition for removal of said cause to the United States District Court), the United States filed in said Court of Claims a written petition entitled, "Petition by the United States for reargument of claimant's motion to dismiss the petition, and for leave to file an answer alleging a set-off and coun-

ter claim and to prosecute the same," which said petition is part of the record of the said Court of Claims, and is found in full in Volume II of Exhibit D to this petition, at page 7.

The prayer of said petition is "that the said order of April 30, 1923, may be vacated; that the claimant's motion to dismiss without prejudice or otherwise be denied, and that the set-off and counter-claim of the United States be filed and prosecuted, and that the United States may have such further order, judgment, decree or relief as it may be entitled to."

In said petition of the United States for reargument, it is alleged in paragraphs VIII, IX and X thereof (see Volume II of Exhibit D to this petition at pages 13-14), that subsequently to said order of dismissal, said petitioner, Skinner and Eddy Corporation, instead of filing another suit in said Court of Claims "has brought an action at law in a State Court of the State of Washington, against the United States Shipping Board Emergency Fleet Corporation, upon the same cause of action as is alleged in its claim heretofore filed in this court." It is further alleged that the Fleet Corporation has appeared specially in the State Court and has caused the action to be removed to the District Court of the United States, and that the Fleet Corporation is about to make a motion "to dismiss the said action for lack of jurisdiction over the defendant, upon the ground that said defendant, Fleet Corporation, was not at the time of the institution of said action doing business within the State of Washington."

It is further alleged by the United States in said petition for rehearing that "substantially all documents and all witnesses and evidence required for the

presentation and prosecution of the counter-claim of the United States heretofore attempted to be asserted in this cause are in Washington, D. C., and that if the Fleet Corporation should attempt in said action to set up the said counter-claim and to establish the same, vast expenses would be incurred in sending witnesses and documentary evidence to the State of Washington." Said petitioner denies both the truth and the relevency of said last quoted allegation. It is further alleged that the United States has the right to prosecute said counter-claim in said Court of Claims and that said right exists regardless of the bringing of an action at law by the claimant in another court.

In support of said petitition by the United States affidavits and briefs were filed, and counter affidavits and briefs were filed by said petitioner, Skinner and Eddy Corporation, appearing specially in opposition to said petition for reinstatement.

No cross-complaint, counter-claim, or setoff on the part of the United States was filed in said Court of Claims or presented to said Court at any time before the dismissal of said cause on April 30, 1923. In fact, neither the counter-claim now urged by the United States, nor any other counter-claim, was either filed or exhibited to said Court by the defendant until June 9, 1923 (forty days after the dismissal of said cause), when for the first time a counter-claim (stating the items as afterwards filed herein December 1, 1923), was attached as an exhibit to the affidavit of W. L. Cole, filed in said cause on June 9, 1923. The first time that said counter-claim was filed was on December 1, 1923.

As a result of said argument and briefs, said Court of Claims on October 22, 1923, entered its order over-

ruling and denying the petition and motion of said defendant, the United States, to vacate said order of dismissal made April 30, 1923, and overruling and denying said defendant's motion for leave to file and prosecute its alleged setoff and counter-claim. Thereafter, to wit, on October 23, 1923, said Court of Claims entered an order on its own motion, directing that the order of October 22, 1923, overruling said defendant's motion and petition, be vacated and that said motion be set for further hearing before the Court on Monday, October 29, 1923. Said matter was thereafter continued to November 12, 1923, on which date it was argued and submitted.

On November 28, 1923, said Court of Claims filed its written opinion and decision, directing that the order of dismissal entered April 30, 1923, be vacated "and another order entered overruling the motion to dismiss and allowing the Government to file its counter-claim." Said opinion and order of the Court of Claims is found in Volume II of Exhibit D to this petition, at page 51.

X.

For the information of the Court, we give the following chronological table of events, underscoring the dates on which any step or proceeding took place in petitioner's said cause in the Court of Claims:

June 15, 1917— Act of Congress approved, authorizing the President or his authorized agents to cancel contracts and requiring just compensation to be made. 40 Stat, L, 183.

June 5, 1920— Act of Congress, known as the "Jones Act," approved, granting certain powers to the Shipping Board, continuing the existtence of the Fleet Corporation, and constituting the Shipping Board the agency to determine just compensation for cancellation of contracts relating to building of ships. 41 Stat. L, 989.

December 28, 1920—Petitioner files with Auditor for the State and other Departments unverified statement of its claim, claiming $24,247,119.31, less credits of $6,230,142.60, leaving a net amount claimed in favor of petitioner of $18,016,976.71, this including anticipated profits, but not mentioning just compensation for cancellation. See Volume II of Exhibit D to this petition, at page 32.

April 4, 1921— Decision of Court of Claims in College Point Boat case, holding that a contractor can recover anticipated profits on contract made during the war with Navy Department and later cancelled by that Department, the cancellation being an actual breach. Said decision was withdrawn before it was officially reported, but appears in full as Exhibit A to this petition.

June 15, 1921— Petitioner, Skinner and Eddy, Corporation, files suit in Court of Claims.

N. B.—At this time the holdings of the Courts generally were in favor of the proposition that the Fleet Corporation was not liable for such contracts, but that the remedy was against the United States in the Court of Claims.

August 15, 1921— Clerk of Court of Claims enters defendant's general traverse, under rule 34 of said court, no plea, answer or counter-claim having been filed.

January 9, 1922— Decision of Court of Claims in Meyer Scale case, 57 Ct. Cls. 26, holding that anticipated profits cannot be recovered in case of cancelled contracts, and stating that decision in the College Point Boat case has been overrule.

January 16, 1922— Court of Claims sets aside its decision in College Point Boat case without filing any new opinion. See foot-note published in 57 Ct. Cls. 51.

March 29, 1922— Petitioner's claim filed in quadruplicate with United States Shipping Board, following the decision of the Court of Claims in the Meyer Scale case. 57 Ct. Cls. 26.

May 1, 1922— United States Supreme Court decides Sloan and Astoria cases, 258 U. S. 549, holding that contracts of this character, that is, contracts made by the Fleet Corporation "representing the United States," are contracts of the Fleet Corporation and not contracts of the United States.

June 26, 1922— Court of Claims decides case of Russell Motor Car Co. vs. United States, 57 Ct. Cls. 464, holding that Act of June 15, 1917, concerning the cancellation of contracts, relates to contracts made by the United States in its behalf, and that anticipated profits cannot be recovered. It is there stated that the Court's conclusion and judgment in the College Point Boat case had been set aside. (57 Ct. Cls. 496.)

February 14, 1923—United States Shipping Board makes order determining just compensation to petitioner for cancellation of contracts to be $3,130,433.46, but declares that petitioner owes the Fleet Corporation "representing the United States of America," a greater sum and directs that therefore no payment be made to petitioner. See Volume II of Exhibit D to this petition, at pages 11-13.

April 9, 1923— United States Supreme Court decides Russell Motor Car case (261 U. S. 514), affirming Court of Claims decision in same case and authoritatively holding (a) that the Act of June 15, 1917, authorizing cancellation of contracts, applies to all contracts, including those made by the Government, (b) that there can be no recovery in case of cancellation for anticipated profits, and (c) that the sole remedy of the contractor in case of cancelled contracts is to pursue his remedy for just compensation as defined in the Act of June 15, 1917.

April 11, 1923— Petitioner, in view of holding of Supreme Court announced two days before in Russell Motor Car case, and in view of the decision of the Supreme Court in the Sloan and Astoria cases and other rulings, files in Court of Claims its motion to dismiss without prejudice its action there pending, and petitioner also leaves with clerk of said Court its praecipe for dismissal of said cause.

April 12, 1923— Defendant, the United States, moves in Court of Claims for "an order granting to it the right to withdraw its general traverse and to file its answer and cross-bill."

November 28, 1923—Opinion and order filed in Court of Claims vacating order of dismissal made April 30, 1923, and ordering that petitioner's motion to dismiss be overruled and that the Government be allowed to file its counter-claim.

December 1, 1923— Answer and counter-claim of defendant, United States, filed in Court of Claims, pleading payment and *nil debet,* and counter-claiming affirmatively against petitioner for $9,275,148.03.

N. B.—This is the first appearance of the counter-claim in court, except that it appears as an exhibit to the affidavit of W. L. Cole filed June 9, 1923 (Volume II of Exhibit D to this petition, at page 27). The leave to file the counter-claim was granted seven months after the action was dismissed on petitioner's motion.

XI.

For the information of the Court we give here a résumé of the items alleged and sued for in petitioner's petition filed in the Court of Claims, a copy of which petition, with all exhibits thereto, constitutes Vol. I of Exhibit D to this petition. The petition alleges that petitioner had contracts with the Fleet Corporation (mentioned as "representing the United States"), for the construction of ships, as follows:

Supplemental Contract 10-SC, made Februry 16, 1918, for six steel vessels (all delivered).

Contract 175-SC, made January 15, 1918, for fourteen steel vessels (all delivered).

Contract 309-SC, made May 27, 1918, for fifteen steel vessels (all delivered).

Contract 324-SC, made June 1, 1918, for 35 steel vessels, of which 22 were delivered, and as to 13 the contract was cancelled.

Contract 447-SC, made July 18, 1918, for 12 steel vessels, as to all of which the contract was cancelled.

The petition also alleges a special contract between petitioner and the Fleet Corporation (mentioned in the petition, but not in the contracts, as "representing the United States"), dated May 11, 1918, regarding the purchase by petitioner from the Fleet Corporation of a shipbuilding plant, known as plant No. 2, formerly owned by the Seattle Construction and Dry Dock Company, and the use of said plant by petitioner for constructing said vessels. The items of the claims alleged in the petition as arising under said contracts are as follows:

Amount expended for betterments, payments to the United States, and carrying charges under contract of May 11, 1918, for Plant No. 2	$1,872,576.37
Anticipated profits on 25 ships contracted for but cancelled under contracts S. C. 324 and S. C. 447.	17,303,845.25
Losses on materials purchased for cancelled ships	906,416.26

Advance payments to sub-contractors on cancelled ships.....	332,034.27
Balance due claimant under Contract 309-SC for one of the vessels completed and delivered under this contract	184,500.00
Balance due claimant under Contract 324-SC on six of the vessels completed and delivered under this contract	813,000.00
Accrued bonus allowance on account of advance deliveries on ships...	536,000.00
Accrued bonus allowance on account of advance deliveries on ships...	1,259,600.00
Extra labor costs for holidays, Saturdays, etc.	454,763.55
Overhead expenses during labor strike, stoppage of work being ordered by E. F. C.	336,575.26
Extra freight paid on materials...	33,618.60
Cost of certain alterations	56,698.00
Extra trial tests and work required therefor.....	8,867.45
Repairs and additions to E. F. C. Steamer FORT WRIGHT	190.28
Repairs and additions to E. F. C. Steamer EGREMONT	136.00
Repairs and additions to E. F. C. Steamer EDGEHILL	16,837.13
Repairs and additions to E. F. C. Steamer WEST MAXIMUS ...	26,946.29
Repairs and additions to E. F. C. Steamer EDGEMONT	24,784.84
Total of Items	$24,167,389.55
Less credits and offsets stated in petition	6,673,900.58
Amount claimed in petition	$17,493,488.97

XII.

The counter-claim (which was first exhibited to the Court of Claims as an Exhibit to an affidavit on June 9, 1923, and was first filed in said court on December 1, 1923, pursuant to leave first granted on November 28, 1923), is as follows:

"Further answering the petition and by way of setoff or counter-claim the defendant states that plaintiff is indebted to the defendant in the gross sum of $9,275,148.03 because of certain transactions in connection with the contracts heretofore referred to; that said sum is made up of the following items, to wit:

Advances on canceled ships	$4,612,500.00
EFC Stores bought by Claimant	623,387.46
Turbines and Spares furnished by EFC	804,440.02
Anchors and Chains furnished by EFC	35,288.26
Sundry Credits to EFC	2,673.90
Repairs of Defective Work	9,152.43
Omissions of Equipment	35,263.60
Plant No. 2 Equipment taken by Claimant	146,150.10
Rent of Yard No. 2	2,750,000.00
Bonuses paid in Error	113,800.00
Liquidated Damages	100,000.00
Damages to Derrick	7,500.00
Heney Taxes	6,997.00
Overtime Bonus paid in Error	27,995.26
Total Offsets	$9,275,148.03

WHEREFORE, the defendant prays judgment for the said sum of $9,275,148.03, with interest from the date of payment by the defendant."

And your petitioner avers that all the contracts and transactions involved in said counter-claim are contracts and transactions between your petitioner and said United States Shipping Board Emergency Fleet Corporation.

Further, if said counter-claim is allowed to stand and your petitioner is required to defend against it in a suit in the Court of Claims, petitioner will not be permitted to prosecute in said suit its claim for just compensation even to the extent of the $3,130,433.46, which the Shipping Board determined on February 14, 1923, to be just compensation to petitioner for the cancellation of said contracts, for the reason that said determination was made after suit had been filed. In said counter-claim, as appears in the items thereof above set forth in this paragraph, no credit or allowance is made to petitioner for said sum of $3,130,-433.46, determined by the Shipping Board to be the just compensation awarded and allowed to petitioner because of the cancellation of said contracts.

XIII.

Your petitioner is advised and believes that on the filing of its motion and praecipe for dismissal of said cause on April 11, 1923 (there being no counter-claim then pending) an absolute right of dismissal appertained to petitioner without any exercise or right of exercise of discretion on the part of said Court of Claims.

Further, if (as petitioner denies) any discretion whatever existed on the part of said Court of Claims to grant or withhold such dismissal, such discretion, when once exercised by the making of the order of dismissal, was final.

Further, all power and jurisdiction of said court to grant to defendant the right to file a cross-complaint or counter-claim against petitioner ceased on petitioner's moving for dismissal of said cause.

Petitioner respectfully further suggests that it is beyond the power and jurisdiction of said Court of Claims to revoke and recall its order of dismissal by reason of a subsequent event, namely, the beginning by said petitioner of a new suit against the United States Shipping Board Emergency Fleet Corporation. As said petitioner, under the decisions of the Supreme Court, had the right to sue said Fleet Corporation on its contracts (being the contracts alleged in the petition in said Court of Claims) it had the right to bring such suit against said Fleet Corporation in any State where it found said Fleet Corporation doing business, including the State of Washington where petitioner resides and where the cause of action arose. For the Court of Claims to revoke its order of dismissal of April 30, 1923, for the reasons advanced by the United States in its petition for rehearing or for any reason here appearing, petitioner respectfully suggests, is not only unjust, but is arbitrary and beyond the powers of said court.

It is further in excess of the jurisdiction of the said Court and unjust to reinstate said cause for the purpose of allowing the United States to wage against said petitioner in said Court of Claims, a counter-claim which the United States or the Fleet Corporation may wage against said petitioner in the ordinary courts of law, and which under the statutes of the United States cannot be waged against one who is not voluntarily an actor in said Court of Claims.

Further, the counter-claim which the United States

is attempting to assert in this cause, as hereinbefore set out, consists of items, all of which are items accruing to said Fleet Corporation, and not to the United States, as follows from the decision of this court in the Sloan and Astoria case, 258 U. S. 514, 549.

Further, said Court of Claims never at any time had jurisdiction of the said cause begun in said Court by petitioner, for the reason that it appears on the face of the petition in said cause that the contracts and transactions therein alleged are contracts and transactions of the Fleet Corporation and not of the United States. This follows from the decision of the Supreme Court in the Astoria case holding the Fleet Corporation to be a private corporation and that its contracts and transactions are the contracts and transactions of that corporation and not those of the United States. The attempt of petitioner (under the mistaken view of the law prevailing at the time the suit was begun in the Court of Claims) cannot, of course, confer on the Court of Claims jurisdiction to determine the liabilities of a private corporation.

Further, said petitioner respectfully suggests that it has a right to wage its cause of action, arising under said shipbuilding contracts, in such forum and against such defendant as said petitioner may be advised is most likely to procure for it an effective remedy, and petitioner cannot be compelled to wage said matters in a suit prematurely brought or in a suit against the United States as a defendant instead of against said Fleet Corporation.

Said petitioner further respectfully suggests that if said contracts were cancelled by the United States, the right to assert a claim for just compensation by reason

thereof can only be asserted in the Court of Claims in a suit commenced *after* an award of just compensation made by the United States Shipping Board, and the opportunity and right of the United States to wage any proper counter-claim that it may desire to wage in said court will accrue when said petitioner begins suit against the United States for said just compensation. Further, should the United States, in advance of the institution of such new suit by petitioner in the Court of Claims, desire to wage affirmatively any claim that it may have against petitioner, it may, of course, do so in the ordinary courts of law.

XIV.

Your petitioner is informed and believes that the said order of the Court of Claims made November 28, 1923 (vacating the order of dismissal made April 30, 1923, and allowing the United States to file and wage in said Court of Claims a counter-claim against said petitioner) is invalid and without jurisdiction and in excess of the jurisdiction of said Court of Claims; and that further proceedings in said Court and cause, without the consent of this petitioner, and against its objection, are and will be without validity and unjust and arbitrary; that the Court of Claims had no power to make said order; that this petitioner cannot appeal from said order; that the effect of said order is to compel said petitioner to prosecute in said Court of Claims a suit prematurely brought, and to compel said petitioner to litigate in said Court a counter-claim, prosecuted by the United States against your petitioner who is not voluntarily in said court and who took

all necessary and proper steps to withdraw itself from the jurisdiction of said court before any assertion or attempted assertion of a counter-claim was made; that said Court of Claims has no jurisdiction of said counter-claim; that the statutes of the United States do not require a plaintiff to remain in said Court, or to respond to any counter-claim therein when he himself is not an actor in said Court; that the further hearing of said cause, either on the petition or on the alleged counter-claim, against the objection of said petitioner, will be in violation of the rights of said petitioner guaranteed to it by the Constitution of the United States and by the Statutes of the United States, and the decisions of this Court, particularly the constitutional provisions and statutes granting the right of trial by jury in civil actions and the decisions of this Court which permit said petitioner to dismiss any action begun by said petitioner, which it considers not likely to secure its full rights, and further, would be in violation of the statute which limits the jurisdiction of the Court of Claims with respect to causes of action in favor of the United States, to counter-claims and setoffs against plaintiffs who are themselves actors in said court; that because of said reinstatement order of November 28, 1923, said petitioner, if said order is upheld, will be required to remain in said Court of Claims when said petitioner is positively prohibited by the statutes of the United States (Judicial Code, Section 154; 36 Stat. L, 138), from prosecuting its said suit therein on account of the pendency of said other suit brought by said petitioner against said Fleet Corporation, and now pending in the United States District Court at Seattle, which suit said petitioner had

the lawful right to begin and has now the lawful right to prosecute; that (as petitioner is informed and believes) one of the purposes of the United States in seeking said reinstatement order is to require this petitioner to dismiss said suit of petitioner against the Fleet Corporation now lawfully pending in the United States District Court at Seattle.

Your petitioner further shows that said Court of Claims is claiming that it has discretion to reinstate said cause, whereas it lost jurisdiction of said cause when it dismissed the same on April 30, 1923; and said Court has no power or jurisdiction in any case to reinstate a cause by reason of subsequent events, as it is now attempting to do at the instance of the representatives of the defendant United States.

Said petitioner is without any remedy or redress against said order in the ordinary course of law, and has no remedy adequate to protect said petitioner against said attempted excess of jurisdiction but by the special intervention of this Court by a writ of mandamus or prohibition directed to said Court of Claims.

If further action of said Court of Claims is not now prevented by peremptory writ and order of this Court, and if petitioner is left to its remedy by appeal after final judgment in said cause, petitioner, as well as the United States, will be put to enormous cost and expense in litigating the numerous items concerned, many of which are greatly complicated, all of which cost and expense will go for naught, and petitioner will also suffer grievous delay and will have to incur serious risk and hazard regarding the proper forum for the assertion of its rights, all of which will amount, as

petitioner is informed and believes, to a denial of justice and will work irreparable injury and damage to petitioner. As will appear by the examination of the petition filed in the Court of Claims, said action involves numerous contracts and an almost infinite number of details in connection with said contracts, and if said action should proceed to trial, it would necessarily involve the examination of a large number of witnesses and the taking of many months of testimony, besides the examination and introduction in evidence of a very large number of documentary exhibits. Substantially all of the witnesses for petitioner reside in the City of Seattle, State of Washington, and substantially all of the documentary evidence is in the office of petitioner in said City of Seattle, where all the work under said contracts was performed or to be performed. That a large part of the evidence that must be adduced in said case is to be found in petitioner's books of accounts, and said books are very voluminous and are all in the office of petitioner in the City of Seattle. The taking of all of said testimony would involve a large amount of labor and expense, all of which would go for naught if petitioner be relegated to its remedy by appeal, and if it should be finally held by this Court that the Court of Claims is without jurisdiction of said cause. Moreover, if a writ of mandamus or prohibition be not granted, petitioner will be compelled to defend against the counter-claim filed by the United States in said cause in said Court of Claims, and will be deprived of the right to a trial by jury of the issues raised by said counter-claim, which right is guaranteed petitioner by the Constitution of the United States.

If petitioner should now be compelled to dismiss its suit now pending in the United States District Court at Seattle, and be compelled to prosecute its claim before the Court of Claims (such dismissal being required in order to comply with Section 154 of the Judicial Code if petitioner remains in the Court of Claims), then before a final hearing could be had in this court on appeal from the Court of Claims, the cause of action of petitioner against said Fleet Corporation now asserted in said suit pending in said United States District Court at Seattle, would be barred by the Statute of Limitations.

WHEREFORE, your petitioner prays that a rule may issue from this Honorable Court directed to the Honorable the Chief Justice and the Associate Judges of the United States Court of Claims requiring them to show cause why a writ of mandamus should not issue commanding the said Chief Justice and Associate Justices of said court and each of them, to restore to full force and effect said order of dismissal made on April 30, 1923, in the case of Skinner & Eddy Corporation *vs.* United States, 199-A and further requiring them to set aside an order made by the said United States Court of Claims on November 28, 1923, vacating said order of dismissal of April 30, 1923, and that they be prohibited from further attempting the exercise of jurisdiction in said cause, and why your petitioner should not have such other and further relief in the premises as may be just and meet.

Your petitioner also prays that, in order to protect your petitioner from irreparable loss while this application is pending, a temporary order issue forthwith requiring said Court of Claims to refrain from

exercising any jurisdiction in said cause while this application is pending in this Court.

And your petitioner will ever pray.

Dated at Seattle, Washington, January 2, 1924.

SKINNER & EDDY CORPORATION,
By
D. E. SKINNER,
Its President.

LOUIS TITUS,
J. BARRETT CARTER,
LIVINGSTON B. STEDMAN,
GEORGE DONWORTH,
Attorneys for Petitioner.

STATE OF WASHINGTON, }
COUNTY OF KING. } ss:

D. E. Skinner being duly sworn on oath deposes and says, that he is president of the Skinner and Eddy Corporation, a corporation organized and existing under the laws of the State of Washington, the petitioner herein named, and is authorized to make and verify the foregoing petition in behalf of said petitioner; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated to be alleged on information and belief, and that as to these matters, he believes them to be true.

D. E. SKINNER.

Subscribed and sworn to before me this 2nd day of January, A. D. 1924.

LINA HAMM,
Notary Public in and for the State of Washington, Residing at Seattle.

PETITIONER'S EXHIBIT A.

COURT OF CLAIMS OF THE UNITED STATES.

No. 34220.

(Decided April 4, 1921.)

COLLEGE POINT BOAT CORPORATION

vs.

THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

The plaintiff, the College Point Boat Corporation, is a corporation duly incorporated and existing under the laws of the State of New York.

II.

Under date of October 25, 1918, the plaintiff entered into a contract with the United States, represented by the Paymaster General of the Navy, to furnish the Navy Department, for a consideration of $641,200, two thousand collision mats, such mats being a part of the equipment for ships, and intended for use in stopping leaks in a ship's hull resulting from collision or otherwise. A copy of said contract, including the specifications for the work, is annexed to the plaintiff's petition as Exhibit A, and is by this reference made a part of these findings of fact.

III.

Pursuant to said contract the plaintiff placed orders for about $153,056.60 worth of the materials needed in the manufacture of said mats, and proceeded with a rearrangement and enlargement of its plant, which was necessary to the performance of its contract. In placing said orders for materials the plaintiff, where it could do so, reserved a right to cancel the orders in case its contract should be canceled by the Government.

IV.

The canvas to be used in making the mats was to be furnished by the defendants. On or about December 3, 1918, the plaintiff verbally requested the defendants to furnish the canvas, and defendants' officers thereupon promised to expedite the furnishing of it, but at the same time requested and arranged for a conference with the plaintiff, in the matter of the contract, to be held on December 6th following. At this conference the plaintiff was informed by defendants that on account of the signing of the armistice and the probable early termination of the war the mats called for by the contract would probably not be needed, and that the department therefore desired to negotiate for the cancellation of the contract. Also it was suggested by said officers that plaintiff stop operations for the performance of the contract and submit a proposition as to the basis upon which a cancellation of the contract would be satisfactory to it.

The said canvas for the mats was never furnished by the defendants, nor did the plaintiff gain request that it be furnished.

V.

Following said conference of December 6, 1918, and pursuant to defendants' said suggestion and request, the plaintiff stopped operations for the performance of said contract, and, under date of December 30, 1918, wrote the Navy Department as follows:

"Replying to your request as to on what basis we will accept cancellation or reduction in quantity of contract No. 42877 for 2,000 collision mats, aggregating $641,200, we submit the following proposition for your approval:

"We appreciate that the desire of the Navy Department is to cancel the contract completely by mutual agreement, without expenditure for articles for which at the present time it has no need. We also wish it understood that the natural aim of the College Point Boat Corporation is to complete the entire contract which was entered into in good faith to supply a need of the Navy Department at the time. Particularly since it has not only allotted a considerable time of its plant and organization to this contract to the exclusion of other opportunities, but has also made all preparations and engagements for performance so that its expenditures and profits are not conjectural, but are practically liquidated. Between those two widely divergent views the settlement must be made upon the fairest and most equitable terms to both parties to the contract.

"Two ways to come to an agreement present themselves, and have been particularly mentioned by you. (1) What reduction in number will permit the College Point Boat Corporation to reduce subcontracts accordingly, realize expenditures already made, keep their plant busy until it can be filled with other work

and render possible making of a profit during the time now under contract equal to the profit which would have been realized by completing the entire amount contracted for. (2) To cancel as much as possible of the subcontracts for material, the Navy to accept at cost plus a reasonable charge for handling all materials now on hand, and to indemnify the College Point Boat Corporation by payment of liquidated damages covering expenditures made on account of the contract; and overhead and other expenses which must necessarily be made during the time for which the plant was retained for this contract; and which can not be allotted to anything else or otherwise recovered; and net profits which would have resulted from completion of the contract.

"Considering the first proposition, it can readily be seen that whatever reduction is made in the number of mats, the price remaining the same, the return per mat as well as the total return will be reduced since the overhead charges will be apportioned over a smaller number of mats. This would lead to the alternatives of either increasing the unit price with reduction in quantity, or increasing the separate damages with reduction in quantity at an unchanged unit price. We believe after our recent discussion of the subject that neither of these alternatives would be satisfactory to the Navy, since it feels that it does not require any mats, and would only accept a small number at an unchanged price, in order to keep the employees from being thrown out of work suddenly. There is the further possibility of taking other remunerative work after a stated portion of the contract has run out but a careful consideration shows no probability of any important gain from this source. The present capacity, created expressly for this contract, represents an

increase of about six times over the former sail loft, which was of the proper size to care for normal business requirements. Our competitors all have shops of about that size, which seems to prove that normal commercial conditions will not produce enough work to fill large shops operating on a manufacturing basis. With this contract on hand we were enabled to prepare for it on a manufacturing basis, but it is evident that commercial business can not furnish the work to fill it. Further, although proposals were opened by the Government for materials prior to the armistice, they have since been cancelled and apparently no new work is available from that source.

"This brings us to consideration of the second method, that of doing no further work and the obligations of the Navy being definitely evaluated and paid as liquidated damages for cancellation of contract.

"Assuming work to be stopped at the present time, no further shipments of raw materials made, subcontracts canceled, and materials now on hand taken over by the Navy at cost to us plus reasonable handling charges, there would still remain certain contract relations which if unfilled would represent a loss to the College Point Boat Corporation. The College Point Boat Corporation is in a position to fulfill the requirements of the contract, and certain overhead expenses would be borne by this contract and certain profits made as shown by schedule A. The Navy has virtually contracted for or leased certain output, which is the total output of the College Point Boat Corporation in this class of work, capacity having been expanded to six times its previous normal size for the express purpose of executing this contract. A decision made by the Navy at the present time that it does not require the output contracted for or the lease that it holds does

not release it from the obligations of a contract in which the other party has cared for its own obligations, stands ready to complete them, and its capacity being taken, has been prevented from entering into contracts with other customers. Therefore the Navy has either one of the two proper courses open—to continue with all the provisions of the contract, accepting deliveries of materials in accordance with it and making payments therefor, or to make such payments to the College Point Boat Corporation as will equal the expenses the corporation would have to bear, and the profit which would have arisen from the fulfillment of the contract.

"Since under the later course it may be said that contingencies might have arisen which would have affected the anticipated profit, certain allowance should be made in the form of a reserve for contingencies, which will guarantee the net profit stated. This can perhaps be best done by taking the cost of having the profit insured as a definite sum, against all contingencies, and the amount of the premium to be paid for such insurance deducted from the gross expected profit, giving a net profit which could not but have been made.

"Under this same course it will also be seen that certain overhead expenses will not occur at all if no work is done on the contract, while others will go on whether or not production continues. In schedule (1) the various overhead charges have been classified into these two groups, and it will be apparent that if no work is done the Navy can not be asked to be responsible for the expenses which were not incurred.

With the above two paragraphs in mind we may take figures from schedule A as follows:

9 by 9 mats:	
Indirect overhead, 6.55 × 1,000	6,550.00
Profit, 69.830 × 1,000	69,830.00
12 by 12 mats:	
Indirect overhead, 6.55 × 1,000	6,550.00
Profit, 85.480 × 1,000	85,480.00
Gross profit and incurred expense	168,410.00
Less quoted insurance premium	16,633.29
Net liquidated damages	151,776.71

SCHEDULE A.

"Complete synopsis of estimated costs; based on prices contracted for materials, hand labor task with full bonus, estimated average riggers time, and overhead as per schedule 1. Overhead has been divided into direct costs, which would be eliminated if no work was done, and into indirect costs, which are unchanged by work not being done.

	9 by 9.	12 by 12
Labor, cutting	$0.04	$0.06
Machine sewing	1.11	1.53
Hand sewing	27.80	44.17
Rigging	3.20	3.20
Total labor	32.15	48.96
Total material	162.675	168.665
	194.825	217.625
Direct overhead	21.345	21.345
	226.170	238.970
Indirect overhead	6.550	6.550
	232.720	245.520
Profit	69.830	85,480
	302.55	331.00
Freight allowed	3.65	4.00
Contract price	306.20	335.00

"It will be seen by the schedule that profits are very carefully figured and are as nearly liquidated and known as anything in the future can be since the supplies of raw materials, the most uncertain item, are contracted for. The corporation feels that it is fully entitled to the entire profits stated, for the reason that it took the risk of making a less profit or none whatever when it made its bid and has since secured the profit by its own diligent and capable efforts. Attention is invited to the fact that the proposals on this contract were opened three several times and that this corporation was low at each opening, and at the final opening the next bidder was approximately $120,000 above us, and the highest bidder $400,000 above us, on the basis of the total quantity, so that by the foresight and courage of this corporation in taking the contract at a figure very much lower than any other bidder was willing to consider, a very great saving has already, and in any event, been made to the Navy Department. The department is respectfully invited to consider the situation on cancellation if the contract had been awarded elsewhere. Having voluntarily in the beginning accepted a much less profit than others might have had, we feel that we are entitled to retain that profit so far as it is a matter of certainty when the contract is liquidated or canceled.

"We submit therefore the only proposition which appears fair and equitable to both parties under the circumstances, namely, that the liquidated damages for cancellation of this contract be determined in the manner shown in the second preceding paragraph, and inasmuch as due to the short time available for making up these figures they are necessarily only approximate, we invite accurate confirmation by your representative of the exact cost figures from our records.

We feel, however, that the figures given are substantially correct, and would be willing to fix the liquidated damages at the figure stated above of $151,776.71 in order to settle the question without further delay, subject, of course, to your approval.

"Attached to and forming part of the foregoing proposition is the following list of materials which have already been received from the subcontractors, and which we request the Navy Department to buy from us at cost to us plus reasonable handling charges to us of 2 per cent of their value. We are advised by the subcontractors that they will accept cancellation of the undelivered balance of our orders, therefore we will not have to ask the Navy to accept any responsibility for undelivered materials.

* * * * * * * * *

"From the foregoing list it will be seen that, owing to deliveries not having been made, we have a comparatively large amount of money to pay on this account in the immediate future, with no income from the contract to help us meet same, and request that if this meet with the favorable consideration of the Navy Department this amount be paid us on account without awaiting decision in the matter of liquidated damages."

VI.

On February 10, 1919, an agreement was entered into between the plaintiff and the defendants by which the defendants purchased and took over from plaintiff, at the cost thereof to plaintiff, $44,066.07 worth of materials which had been purchased by and delivered to plaintiff for use in the performance of its said contract, on orders for which the plaintiff could not procure cancellation. A copy of said agreement is annexed to the plaintiff's petition as a part of Exhibit

A, and is by this reference thereto made a part of these findings of fact.

VII.

Under date of February 26, 1919, the Paymaster General of the Navy wrote the plaintiff as follows:

"Subject: Contract 42877; collision mats; regarding cancellation; adjustment.

"SIRS: By reason of the changed conditions of the country due to the signing of the armistice, the public interests demanded that cancellation be effected with respect to the material as called for under contract 42877, for the reason that the same were no longer needed by the Navy.

"Notice to discontinue all work under the contract and incur no further obligations was sent your company prior to any manufacturing work having been done on the collision mats as called for by the contract. The only work done under the contract has been the purchasing of the necessary material with which to prosecute the contract to completion. Some of this material had already arrived at your works, while other quantities were under commitment orders.

"The Navy has already agreed to take off your hands all material which could not be canceled from your subcontractors and to pay the invoice cost of this material to you; and, in fact, supplementary contract February 10, 1919, provided for the reimbursement to you in the sum of $44,031.16, for the major part of the material; and the Navy also agrees to pay you the sum of $10,231.80 covering the steel wire and steel rope purchased by you from the Hazard Manufacturing Co., cancellation of which subcontract could not be effected.

"From investigation at your plant it is also believed that the sum of $1,900 is properly allowable for plant rearrangement, which rearrangement was made.

"In addition to the foregoing, be advised that the Navy does not feel that it can consider the item of your claim with respect to your estimated unearned profits, which is shown on your claim to be $182,420.

"In the interests of an amicable adjustment of the whole matter, the Navy has proceeded with respect to this item on the basis of what would be considered a fair allowance of profit had the work proceeded under a Navy order, and it has been found that a profit allowance of $32,120 would be a fair amount for the entire contract, as this sum would represent a return of 20 per cent on invested capital used over a production period of nine months.

"Considering the matter from this angle, and considering that the value of the material purchased is a certain per cent of the total cost of completion, it is proposed to allow you that per cent of $32,120 as additional sum to the sums as previously mentioned.

"The ratio is about 12.06 per cent, and therefore 12.06 per cent of the profit allowance of $32,120 would make $3,873.67 properly allowable.

"By way of recapitulation, therefore, the Navy will allow the following:

Cost of material purchased	$54,262.96
Reasonable handling charges thereon at 2 per cent	1,085.26
Allowance for plant rearrangement	1,900.00
Profit allowance on 12.06 per cent of total contract	3,873.67
Total	$61,121.89

"The foregoing is submitted after careful consideration of all the circumstances in the case, and is forwarded for your consideration prior to submitting the same to the Secretary of the Navy for approval.

"You are advised that no settlement is effective until the Secretary has so approved, but it is believed by those handling this matter that such a suggested settlement can reasonably be expected to receive approval."

VIII.

Under an agreement between the plaintiff and the defendants, of date June 30, 1919, the defendants purchased from the plaintiff, and subsequently paid for at cost to plaintiff, $10,225.60 worth of additional material which had been purchased by plaintiff for the contract work on orders for which plaintiff could not procure cancellation. This material had not yet been shipped to plaintiff, and was therefore subsequently delivered by the manufacturer direct to the defendants, without being handled by the plaintiff. A copy of said agreement of June 30, 1919, is annexed to the plaintiff's petition as a part of Exhibit A, and is by this reference made a part of these findings of fact.

IX.

A reasonable allowance for the work and expense of purchasing the $44,066.07 worth of materials purchased by and delivered to the plaintiff, as shown by Finding VI, is $881.32; and a reasonable allowance for the work and expense of contracting for the remaining $108,990.53 worth of the materials contracted for by the plaintiff, but not delivered to plaintiff, is $1,089.90.

X.

Allowing for the contingencies and risk attendant upon a performance of the contract, and for the relief of the plaintiff from the risk, care and responsibility of performance, a reasonable allowance, upon the evidence, for profits on the plaintiff's said contract is the sum of $115,000.

XI.

Prior to the negotiations for cancellation of said contract, and the suspension by plaintiff of operation thereunder, the plaintiff incurred an expense of $1,900 in rearranging and enlarging its plant, exclusive of the cost of additional machinery; and also an expense of $641.20 as premium on its contract bond. These expenses were necessary for and in connection with a performance of the contract, and were not necessary for the plaintiff's business outside of said contract.

A loss of $600 was sustained by the plaintiff through depreciation of machinery purchased by it for performance of said contract, and which, by reason of the nonperformance of the contract, was not needed by it.

XII.

The plaintiff appears to have been willing to go on with the performance of the contract work. After the plaintiff's request of December 3, 1918, for the canvas which was to be furnished by the Government, no demand or request, either by the plaintiff or by the defendants, appears to have been made for the performance of the contract work; and no protest or complaint appears to have been made by either party on account of the suspension and nonperformance of the work.

XIII.

The plaintiff has received no payments from defendants on account of its said contract other than the payments to plaintiff for materials in accordance with the said agreements of February 10 and June 30, 1919, set forth in Findings VI and VIII.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $881.32 and $1,089.90 shown by finding IX; $15,000 shown by finding X; and $1,900, $641.20, and $600 shown by finding XI, an aggregate of $20,112.42. It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of $20,112.42.

OPINION.

Booth, Judge, delivered the opinion of the court.

A collision mat, as its name imports, is a combination of various materials into the form of individual mats, as nearly impervious to water as possible, employed alongside the hull of vessels below the water line to prevent leakage in cases of collisions, etc. During the war with Germany the Navy Department sought to acquire large numbers of these mats. The plaintiff herein was a manufacturer of such articles, and in response to a public advertisement for bids for furnishing two thousand of the same submitted its bid and was awarded the contract. The contract, which was in writing, bore the date of October 25, 1918, and among other provisions specifically obligated the plaintiff to deliver ten mats within forty days from the

date thereof or receipt of canvas from the Government, and continue future deliveries at the rate of ten mats daily until the full number had been furnished. The defendant was to furnish the entire quantity of canvas used in their manufacture, the plaintiff to supply all other materials. The consideration passing to the plaintiff upon the completion of the contract was $641,200.

The plaintiff immediately made ready to perform the contract. It purchased large quantities of material through subcontracts, enlarged its plant, and in various ways, as shown by the findings, exhibited commendable zeal in meeting its obligations under the contract. Up to December 3, 1918, no canvas had been furnished by the defendant, and none had been demanded by the plaintiff. On this date the plaintiff verbally requested the defendant to furnish the same, and were promised that its delivery would be expedited. At the same time, however, the defendant requested a conference with plaintiff looking toward an amicable arrangement for the cancellation of the entire contract. The signing of the armistice having intervened, the department no longer required or needed the mats, and requested the plaintiff to cease operations under the contract. The plaintiff did cease all operations thereunder, and on December 6, 1918, submitted a proposition in writing as a basis of settlement of respective contractual rights. This proposition we have set forth in finding V. On February 26, 1919, the defendant wrote the plaintiff setting forth in detail the items of damage it considered just and allowable, none of which is now contested save the item of profits. The counter proposition of the defendant included allowance in full for all materials purchased,

reasonable handling charges thereon, allowance for plant enlargement, and $3,873.67 profits.

Prior to February 26, 1919—viz., on February 10, 1919—the parties had agreed by way of a supplementary contract on the payment for material on hand, the defendant acquiring the same by paying the cost price thereof, and this was followed by an additional supplementary contract on June 30, 1919, wherein the defendant took over additional material not covered by the previous supplementary contract, at the same time the plaintiff expressly reserving in writing the following alleged rights: "Saving, however, to the College Point Boat Corporation the right to pursue any remedy it may have in its own right, arising under contract 42877 or by reason of the terminating of the same, such rights arising not being connected with or growing out of the claims of any subcontractor * * *, all other conditions of the original contract No. 42877 to remain as originally specified."

The plaintiff now asserts a cause of action predicated upon the maintenance of contractual relations in virtue of the above reservations and a positive breach of the contract by the defendant in its failure to deliver the required canvas, this suit being for the recovery of $189,693.09 alleged to be due as profits arising out of the contract. The defendant did not deliver any canvas and subsequently cancelled the contract. While the record does not show an express order of cancellation it sufficiently appears from the facts recited in the findings that subsequent to the signing of the armistice the defendant had absolutely no intention of furnishing any canvas for the completion of the mats, or to permit the plaintiff to perform the contract. The written record furnishes ample proof

of the fact that the defendant conceded the allowance of profits as part of plaintiff's damages. All the negotiations with reference to cancellation mentioned profits, the plaintiff claiming and the defendant conceding their allowance. The failure to consummate an agreement with reference to profits was due entirely to the inability of the parties to agree upon an amount. The breach of the contract by the defendant is obvious. Where one party to an agreement declines to perform a condition upon which performance of the contract by the opposite party depends, the party injured has his remedy, as clearly stated in *United States v. Speed,* 8 Wall., 77. So when the negotiations with respect to cancellation of the contract failed to culminate in a definite agreement with respect thereto, and the final result of the same was nothing more than two supplemental agreements covering the acquisition by the defendant of the plaintiff's materials, purchased by it to perform the contract, this fact alone was sufficient notice to the plaintiff, especially so in view of plaintiff's reservations in the last agreement, that the defendant did not and would not accept the mats or otherwise perform its obligations under the contract. It was in effect, if not in name, a cancellation of the contract and operated to give the plaintiff a cause of action for a breach of the same. *Mt. Holly Mining Co. v. Caraleigh Phosphate Works,* 72 Fed., 244.

To sustain its contention the plaintiff contents itself to rest upon proof of what the performance of the contract would have cost it, subtracts this amount from the consideration mentioned in the same, and insists that the difference, viz, $189,693.09 measures its profits. The testimony adduced to sustain the various items of cost of performance consists of detailed estimates of

the cost and quantity of innumerable items of material entering into the manufacture of the mats, to which is added various items of overhead expenses, both direct and indirect, and the estimated cost of labor incident thereto. The plaintiff never made, and of course never delivered, a single one of the mats mentioned. It did enter into subcontracts for some of the material, all of which, except those mentioned in the two supplementary contracts, were canceled without loss to the plaintiff. It never employed the additional labor mentioned, and, with the exception of the items hereafter to be mentioned, did not in a single instance suffer a monetary loss by these reasons alone because of the cancellation of the contract. It is apparent, therefore, that the conclusion reached as to ultimate cost of the performance of the contract is indisputably conjectural and uncertain. To test its accuracy we must assume the continued existence of certain conditions. We can with precision account for various items of loss, but to say that the definite amount of gain claimed herein is the exact difference between those various items of cost, added to a long list of estimates, in a case where the contract had not proceeded to the point of demonstration, because no work had been done whatever, involves the abject acceptance of mere estimates, depending for their probative force upon various and uncertain contingencies. We do not mean to say that the evidence offered should be entirely rejected; on the contrary, it is to be received and considered by the court in connection with the additional and apparent facts that the plaintiff was relieved from all the risks of the performance of its agreement. Its plant and other resources were released from the burdens of the contract, its time and

opportunity thrown open to the acceptance of other work, all of which was, to say the least, of some advantage to the company. We cannot say with positiveness that the plaintiff would have met the obligations of its contract in every minute particular. The contract contained various provisions of much strictness, it imposed liquidated damages for failure to deliver promptly; it provided rigid rights of inspection; it required the contractor to give preference to this contract over all others; it protected the defendants against the infringement of patents; and in many other ways imposed obligations upon the contractor of such a nature that relief therefrom is necessarily an item to be considered in arriving at the amount of damages the company suffered because of the breach. While the defendant is in no position to contend that the plaintiff would not have fully performed its contract it allowed to proceed, that fact does not preclude the court from taking into account the relief mentioned in assessing damages for the breach. We are alone concerned, with rights accruing by reason of the breach, and awarding damages according to the law governing the relative situation of the parties subsequent to the breach. The case is similar to *United States v. Speed, supra. Broadbent Portable Laundry Corporation v. United States,* No. 34656, decided March 7, 1921.

Profits to be recoverable at all must not be remote or speculative. The proof with respect thereto must bring them within the rule of reasonable certainty, as shown by the long line of authorities cited in plaintiff's brief. This is not the case where a contractor has laid out and expended large sums of money in the performance of his contract and partially performed the same.

Even if it were, there is nothing in the decisions cited which militates against the rule announced in the *Speed case, supra.* As said by the court in the *Broadbent case, supra:* "In the application of the principles laid down there is always difficulty; each case must be determined by its own circumstances." In the trial of this case the court follows the rule long established, awards the plaintiff damages for all its reasonable expenditures and profits it would have earned, assessed according to the principles discussed.

The plaintiff had at the time of the cancellation of its contract the total sum of $61,121.89 actually invested in the performance of the same. Almost immediately thereafter the defendants paid in cash for materials on hand, etc., $54,291.67, thus reducing its actual cash outlay to $6,830.22. If the rule of damages insisted upon is to prevail it is obvious that upon a very nominal outlay the plaintiff recovers damages of large proportions, *i. e.*, $189,693.09, a fact which we think again emphasizes the contingencies inherent in the probable fulfillment of the contract in every particular, as well as the naturally speculative character of the final amount of profit accruing in the event of performance. Taking into account all the testimony in the record with reference thereto we believe plaintiff is entitled to $15,000 profits.

The plaintiff rearranged and enlarged its plant for the exclusive purpose of performing this contract. The proof shows it to have cost $1,900, an amount clearly allowable. An expense of $641.20 was incurred as premium paid for its contract bond. This, too, is allowable.

The plaintiff purchased a quantity of new machinery

to meet the emergencies of this particular contract. It did not otherwise require the machinery, and suffered a proven loss of $600 depreciation thereon. This item will be included in the damages awarded.

The plaintiff purchased and had delivered to it $44,066.07 worth of materials. In acquiring and handling said materials it is entitled to a reasonable charge. This could not be done free of expense and the defendants conceded in their proffered offer of settlement two (2) per cent of the amount would be reasonable. This, amounting to $881.32, we think allowable. In addition to this, the plaintiff had outstanding subcontracts for material amounting to $108,990.53. All save one of these contracts were cancelled by the plaintiff and the material was not delivered, and hence not handled, but the expense incident to its purchase had been incurred and should be allowed. It was evidently not so expensive as the item above, and a reasonable allowance therefore would, in our opinion, be 1 per centum of the total amount, or $1,089.90.

Judgment will be awarded plaintiff in the sum of $20,112.42. It is so ordered.

Hay, Judge; Downey, Judge; and Campbell, Chief Justice, concur.

Dissenting opinion by Judge Graham.

PETITIONER'S EXHIBIT "B."

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

No. 7617.

MEMORANDUM DECISION.

(Filed Nov. 23rd, 1923.)

On Defendant's Motion to Quash Service of Summons.

PUGET SOUND MACHINERY DEPOT, A CORPORATION,
Plaintiff,
v.
UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, A CORPORATION, *Defendant.*

No. 7695.

SKINNER & EDDY CORPORATION, A CORPORATION,
Plaintiff,
v.
UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, A CORPORATION, *Defendant.*

BRONSON, ROBINSON & JONES,
Attys. for Plaintiff in Case No. 7617.

MACCORMAC SNOW, CHAS. E. ALLEN, CLARENCE L. REAMES AND O. P. M. BROWN,
Attys. for Defendant.

HASTINGS & STEDMAN, AND DONWORTH, TODD & HIGGINS,
Attys. for Plaintiff in Case No. 7695.

MACCORMAC SNOW, CHAS. E. ALLEN, CLARENCE L. REAMES AND O. P. M. BROWN,
Attys. for Defendant.

CUSHMAN (*D. J.*)

The two above entitled causes were tried together. In each the plaintiff sued upon contract in the state

court. The defendant removed both causes to this court. The defendant appears specially and moves to quash the service of summons and dismiss, upon the ground that the defendant is not doing business in this state, and was not at the time of service of summons; and upon the further ground that the persons served were not qualified under the law to accept service.

It is contended upon the part of the plaintiff in each suit that defendant has entered a general appearance and cannot now be heard on the motion to quash. Owing to the conclusion reached upon the merits of defendant's motions to quash, it is not necessary to determine whether defendant appeared generally, prior to filing its "special Appearance."

In the one suit there is no record of the return of service of summons; but it appears from the affidavits that in both cases service was made upon A. R. Lintner, acting Director Agent and Manager of defendant. This service was sufficient to confer jurisdiction, providing the defendant was, in fact, doing business in the district at the time of such service.

Defendant's main contention is that it can only be sued in the District of Columbia, where it was incorporated; that it has not been doing business in this state; that such business as it does or has done, in the State of Washington, was as agent of the United States, and not for its own private gain or advantage.

The affidavits show that offices were rented and occupied by the defendant in the City of Seattle; that in making rental arrangements the lessor was not informed that defendant was securing the lease other than as principal. It is shown that the defendant kept in its name deposits in Seattle banks upon which

it, through one of its officers resident in Seattle, drew checks for the purchase of supplies in Seattle; that since the service of process in this cause the form of check given by the defendant has been changed by adding after the words "United States Shipping Board Emergency Fleet Corporation" the word "Agent."

At the time of service, and prior thereto, on the streets in the City of Tacoma street cars were operated bearing the designation "United States Shipping Board Emergency Fleet Corporation, owner"; that the cars were operated by the City of Tacoma under a conditional sale contract; that between ports in this district and Asiatic ports a line of steamships was and is being operated under the Merchant Marine Act of 1920; that the company selling the passenger and freight service thereon is the Admiralty Oriental Line. In its literature it is described as "Managing agents, United States Shipping Board Emergency Fleet Corporation." It is so described in the forms of its bills of lading and passenger tariffs.

Concerning the operation of these vessels, defendant has filed the affidavit of Joseph E. Sheeday, Vice-President of the United States Shipping Board Emergency Fleet Corporation, in charge of the operations of the corporation. In his affidavit, among other things, he says:

> "That pursuant to the power and authority conferred upon the United States Shipping Board Emergency Fleet Corporation by law and by said resolution of September 30, 1921, passed and adopted by the United States Shipping Board, and to carry out the will and intent of Congress as set forth in Section 12 of said Merchant Marine

Act, 1920, the Corporation did, on November 1, 1922, acting for and upon behalf of the United States of America, as represented by the United States Shipping Board and not upon its own behalf or in connection with any business from which defendant corporation could or would derive any pecuniary gain and benefit, execute a certain contract and agency agreement with Admiral Oriental Line, a corporation, whereby provision was made for the operation by the said Admiral Oriental Line for the United States Shipping Board of vessels of the United States. * * *

"That pursuant to the provisions of said Agency contract and amendments thereto with said Admiral Oriental Line, certain ships owned by the United States of America and controlled by the United States Shipping Board have been operated, into and from the Port of Seattle and other ports, for the United States, by the said Admiral Oriental Line, under the supervision and oversight of the defendant Corporation, acting for the United States of America, pursuant to the power and authority vested in the defendant corporation by law and by the Board resolution of September 30, 1921, hereinabove referred to, and the five passenger ships, mentioned in the affidavit of T. B. Owen, filed in this Cause, were at the time of service of process in this case and are now, and have been since November 1, 1922, some of the ships so operated by the Admiral Oriental Line for the United States of America."

It further appears that defendant was, at the time of service of process, occupying the land constituting the Skinner & Eddy Ship Building Plant No. 2, at Seattle, and that from the concentration yard upon such property it sold, and offered for sale, materials stored in said yard.

Defendant has here contracted in its own name, for

the repair and equipment of ships in this district.

The nature of the defendant's activities are concisely stated in the resolution of the Shipping Board of September 30, 1921. The pertinent parts of this resolution are as follows:

> "Resolved, That the power and authority vested in the Shipping Board by the merchant marine act, 1920, shall, until otherwise ordered by the board, be exercised by it through the United States Shipping Board Emergency Fleet Corporation in the following matters, and to the extent and in the manner hereinafter provided:
>
> (1) The operation, maintenance, repair, and reconditioning of vessels provided that no established line shall be discontinued for new line established, or allocation of passenger vessels made, without the approval of the United States Shipping Board.
>
> (2) The completion or conclusion of any construction work upon vessels which has heretofore been begun or has been authorized by the United States Shipping Board.
>
> (3) The sale of vessels (except to aliens) at such prices and on such terms and conditions as the United States Shipping Board may prescribe.
>
> (4) The operation and sale of housing projects, real estate, railroad and other similar property, subject to confirmation by the United States Shipping Board before any final contract of sale is made.
>
> (5) The operation and sale of dry docks; all sales to be subject to such terms and prices as may be established by the United States Shipping Board.
>
> (6) The custody and sale of all other property and materials.
>
> (7) All accounting for the United States Shipping Board Emergency Fleet Corporation.

(8) Insurance and matters pertaining to the same.

(9) The operation of all piers and pier facilities; provided that no pier or pier facilities shall be leased without prior authorization from the United States Shipping Board.

(10) The leasing and rental of offices, Warehouses, docks, and storage facilities.

(11) All matters incidental to any of the foregoing, including the execution of contracts, charters, bills of sale, leases, deeds, and other instruments necessary or convenient to the exercise of the power and authority hereby conferred upon the United States Shipping Board Emergency Fleet Corporation; and be it further * * *."

Without going further into details of the various business transactions covered by the affidavits, it is clearly shown that the defendant is doing in this district a very substantial part of such business or transactions as it is authorized to do; or; in fact, anywhere does.

While the exact point in controversy does not appear to have been decided, it is clearly implied from the decision of the Supreme Court of the United States, in Sloan Shipyards Corporation *et al, v.* United States Shipping Board Emergency Fleet Corporation and the United States, 258 U. S. Rep., 549, that defendant is suable in this district. Other cases tending to support this conclusion are: Bank of United States *v.* Planters' Bank, U. S. Sup Ct. Rep., 9 Wheaton, 904; United States *v.* Strang *et al,* 254 U. S. Rep., 491; The Lake Monroe, 250 U. S. Rep., 246; United States *v.* Matthews *et ux,* 282 Fed. 266 (9 C. C. A.); King County, Wash., *et al. v.* United States Shipping Board Emergency Fleet Corporation, 282

Fed. 950 (9 C. C. A.); United States Shipping Board Emergency Fleet Corporation *v.* Banque Russo Asiatique, London, 286 Fed. 918; Lord & Burnham Co. *v.* United States Shipping Board Emergency Fleet Corporation, 265 Fed. 955; Gould Coupler Co., *v.* United States Shipping Board Emergency Fleet Corporation, 261 Fed. 716; Buffalo Union Furnace Co., *v.* United States Shipping Board Emergency Fleet Corporation, 291 Fed. 23.

In the United States of America *v.* Roy W. Walter, October term 1923, No. 20, the Supreme Court says:

> "The United States can protect its property by criminal laws, and its constitutional power would not be affected if it saw fit to create a corporation of its own for purposes of the Government under laws emanating directly or indirectly from itself, and turned its property over to its creature. The creator would not be subordinated to its own machinery."

No intention is shown by the foregoing language to narrow in any way the scope of the holding in Sloan Shipyards Corporation *v.* United States Shipping Board Emergency Fleet Corporation. In the instant case, as in the Sloan Shipyards case, the court is determining: not the question of the Government's power but of its intent, as shown by congressional enactments. Congress doubtless could provide that suits, such as the present, could only be brought in the Court of Claims. The Director General of Railroads, with powers not dissimilar in principle to those of the Shipping Board, made orders as to the venue of suits against himself, and such orders were upheld by the courts in a number of decisions meet-

ing the approval of the Supreme Court. Missouri Pacific Railroad Company *et al, v.* Ault, 256 U. S. Rep., 554 at 561, Note 1.

The fact that the plaintiff Skinner & Eddy Corporation may have a suit pending in the Court of Claims to recover upon the same cause of action is of no consequence upon this motion. If the two suits cannot be maintained at the same time, defendant's remedy is a motion to compel the plaintiff to elect in which court it will proceed.

Motions to quash, dismiss and to amend appearance, denied.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF WASHINGTON, } ss:

I, F. M. Harshberger, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that I have compared the foregoing copy with the original Memorandum Decision, filed November 23, 1923, in the foregoing entitled cause, now on file and of record in my office at Seattle and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said Court, this 2nd day of January, 1924.

F. M. HARSHBERGER, *Clerk.*

(SEAL)

By S. E. LEITCH, *Deputy.*

PETITIONER'S EXHIBIT "C."

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

AT LAW No. 7695.

JOURNAL ENTRY.

SKINNER & EDDY CORPORATION, A CORPORATION,
Plaintiff,
vs.
UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, A CORPORATION, *Defendant.*

This cause having heretofore come on to be heard upon the motion of defendant to quash the service of summons in this action, and to dismiss the complaint and to amend the præcipe for appearance heretofore entered herein by the defendant, and the Court, being duly advised in the premises as more particularly appears by its memorandum decision filed herein on the 23rd day of November, 1923,

It is here and now ORDERED and ADJUDGED that defendant's motion to quash the service of summons be, and it hereby is, denied; that the defendant's motion to dismiss this action for lack of jurisdiction be, and it hereby is, denied; that the defendant's motion to amend the præcipe for appearance filed herein be, and it hereby is denied.

To each and all of which said rulings defendant excepts and its exception is allowed.

The defendant may have 30 days in which to answer or otherwise plead to the complaint.

Done in open court this 27th day of November, 1923.

EDWARD E. CUSHMAN,
Judge.

Endorsed; Filed in the United States District Court, Western District of Washington, Northern Division, November 27, 1923.

F. M. HARSHBERGER,
Clerk.

By
S. E. LEITCH,
Deputy.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF WASHINGTON, } ss:

I, F. M. Harshberger, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that I have compared the foregoing copy with the original Journal entry in the foregoing entitled cause, now on file and of record in my office at Seattle and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said Court, this 2nd day of January, 1924.

F. M. HARSHBERGER, *Clerk.*

(SEAL)

By S. E. LEITCH, *Deputy.*

SUBJECT INDEX.

TABLE OF CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

ORIGINAL.

In the Matter of the Application of SKINNER & EDDY CORPORATION, Petitioner, for a writ of mandamus or prohibition to the Honorable the United States Court of Claims.

BRIEF ACCOMPANYING PETITION

STATEMENT.

The facts are fully stated in the petition, but for the convenience of the court, the circumstances leading up to this application will be restated here as concisely as possible.

On April 4, 1921, the Court of Claims held, in the case of College Point Boat Corporation *vs.* United States, that the Government was liable for anticipated profits for the cancellation of a contract made and

canceled by the Navy Department after the Act of June 15, 1917. A copy of this opinion, while never officially reported, appears as Exhibit "A" to the petition.

Prior to the decision of the Supreme Court in the case of Sloan Shipyard Corporation and Astoria Marine Iron Works *vs.* United States Shipping Board Emergency Fleet Corporation, 258 U. S. 549 (decided May 1, 1922), it had been generally held by the Federal Courts that contracts made by the Fleet Corporation were contracts of the United States.

With the aforementioned decisions as a guide, the petitioner, on June 15, 1921, filed suit against the United States in the United States Court of Claims, praying for judgment in the sum of $17,493,488.97. By far the greater portion of this amount was for anticipated profits arising out of the cancellation of certain lump sum contracts between the United States Shipping Board Emergency Fleet Corporation and petitioner for the construction of ships. Another large part of petitioner's claim was for items which, in a suit against the United States, were in reality claims for just compensation.

After petitioner's suit had been filed, the Court of Claims withdrew its opinion in the College Point Boat Corporation case, and reached an entirely contrary view to this decision in the Meyer Scale and Hardware Company case (57 Ct. Cl. 26) and the Russell Motor Car Company case (57 Ct. Cl. 464); that is, in the last two mentioned cases it held that the Government had the right under the Act of June 15, 1917 (40 Stat. L., 183), to cancel its own contracts, and in such case the other party to the contract could not recover anticipated profits. The decision in the Russell Motor case, on appeal to the United States Supreme Court, was affirmed, on April 9, 1923. This case not only de-

cided that anticipated profits for cancellation of such Government contracts could not be recovered, but also held that the remedy was for just compensation in the manner provided in the Act of June 15, 1917, which Act required the amount of just compensation to be determined by the President before suit filed. In the petitioner's case this determination of just compensation was not made until more than a year and a half after the filing of the suit in the Court of Claims. The Supreme Court had previously held in the Astoria Marine Iron Works Case (258 U. S. 549) (decided after suit was filed by petitioner in the Court of Claims) that suit would properly lie against the Fleet Corporation under a contract substantially similar in form to the contracts upon which petitioner had sued in the Court of Claims.

In the light of the above-mentioned decisions rendered after suit was filed by petitioner, it was obvious that petitioner had misconceived its remedy in two vital respects, first, under the Astoria decision the suit was properly against the Fleet Corporation and not against the United States, and, second, even if properly against the United States, petitioner could not, under the Russell Motor case, recover in the suit filed either anticipated profits or just compensation, and therefore, as will hereinafter appear, could not make any recovery at all. Accordingly, on April 11, 1923 (two days after the decision of the Supreme Court in the Russell Motor Car Company case), it moved to dismiss its action in the Court of Claims, at the same time attempting to file with the Clerk of said Court a *praecipe* dismissing the action. At this time no plea or counter-claim had been filed by the Government, but a general traverse had been entered by the Clerk under Rule 34 of that Court, and there had been no

other proceedings of any kind nor had any testimony been taken. A copy of petitioner's motion was served on the Government's Attorney and the next day after the motion was filed, the Government's Attorney filed a motion to withdraw the general traverse and to file a counter-claim, no reason for not having previously filed it being assigned, although the case had been pending for nearly two years.

Both motions were argued orally to the Court, and on April 30, 1923, the Court made its order granting petitioner's motion to dismiss, thus effectually denying the Government's motion.

On the day following, petitioner filed suit in the State Court at Seattle, Washington, against the Fleet Corporation for $9,129,401.14, basing its suit on the same contracts as had been previously sued upon in the Court of Claims,—practically the only difference in the two suits being that no claim was made in the suit against the Fleet Corporation for anticipated profits. This suit was transferred, on application of the Fleet Corporation, to the Federal Court, and a motion was made to quash the service of summons therein. This motion was denied by the Court and the Fleet Corporation is now required to answer that suit.

On the 9th of June, 1923, forty days after the Court of Claims had granted the petitioner's motion to dismiss, and thirty-nine days after suit had been filed in the State Court at Seattle, Wash., the Government filed its petition in the Court of Claims to set aside the order of dismissal, basing its motion, ostensibly, on the fact that at the hearing of the motion to dismiss, petitioneer had suppressed the fact that its claim had been previously filed with the Auditor for the State and other Departments (a fact which had been known to the Fleet Corporation's attorneys for over two years)

and that at the oral hearing the inference to be drawn from the argument of petitioner's counsel was that petitioner intended to file another suit in the Court of Claims, which it had not done,—two wholly immaterial grounds! The real gravamen of the petition, however, as must appear from reading it (see Exhibit D—Volume II, page 7), was that petitioner had filed another suit for the same cause of action against the Fleet Corporation in another Court. This petition was argued to the Court and on October 22, 1923, it filed an order again denying the Government's motion to set aside the order of dismissal, but on the following day this order was set aside, on the Court's own motion, and after further argument an order was entered on November 28, 1923, setting aside the order of dismissal and allowing the Government to file its alleged counter-claim. This counter-claim was filed on December 1, 1923, and petitioner will be compelled to answer it unless the writ herein prayed for be granted.

On February 14, 1923, long after suit had been filed by the petitioner in the Court of Claims, the Shipping Board determined the amount of just compensation to which the petitioner was entitled by reason of the cancellation of its contracts to be $3,130,433.46, but no credit for this nor for any other amount is given by the Government in its counter-claim.

On January 7, 1924, after the petition attached to the motion filed herein was printed and verified, a motion to dismiss was filed by the United States Shipping Board Emergency Fleet Corporation in the suit pending at Seattle, a copy of which said motion is filed herewith as Exhibit "E," and which shows that one of the objects of the motion to set aside the order of dismissal in the Court of Claims was to compel petitioner to dismiss its suit at Seattle.

POINT I.

The Petitioner, the Skinner and Eddy Corporation, Had the Right to Dismiss Its Suit.

There seems to be an almost unbroken line of authorities holding that the plaintiff in a suit has an absolute right to discontinue or dismiss his suit at any stage of the proceedings prior to verdict or judgment, as the case may be, unless *prior to the filing* of the motion to dismiss or discontinue the suit a counter-claim has been filed and even *after* a counter-claim has been filed, under circumstances similar to those shown in the case at bar.

> Veazie *v.* Wadleigh, 11 Peters 54.
> Confiscation Cases, 7 Wallace 454. (See page 457 of the opinion.)
> Barrett *v.* Virginian Railway Company, 250 U. S. 473.

In this latter case this court said (page 476 of the opinion):

> "At the common law, as generally understood and applied, a nonsuit could be taken freely at any time before verdict if not indeed before judgment. The right is substantial." (Citing cases.)

In City of Detroit *v.* Detroit City Railway Company, 55 Fed. 569, the Circuit Court of Appeals for that Circuit, through Judge Taft, reviews the cases and uses the following language:

> "It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without pre-

judice, on payment of costs, was of course except in certain cases. Chicago & A. R. Co. *v.* Union Rolling-Mill Co., 109 U. S. 702, 3 Sup. Ct. Rep. 594. The exception was where a dismissal of the bill would prejudice the defendants in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind."

A few of the other cases on the same point are:

Cowham *v.* McNider, 261 Fed. 714.
McCabe *v.* Southern Railway Co., 107 Fed. 213;
Youtsey *v.* Hoffman, 108 Fed. 699;
United States *ex rel* Goffman *v.* Norfolk & W. Ry. Co., 118 Fed. 554;
Pennsylvania Globe Gaslight Co. *v.* Globe Gaslight Co., 121 Fed. 1015;
Morton Trust Co. *v.* Keith, 150 Fed. 606;
Thomson-Houston Electric Co. *v.* Holland, 160 Fed. 763.

Petitioner's case is similar in facts and identical in principle with the case of McGowan *et al. vs.* Columbia River Packers Association *et al.*, 245 U. S. 352. In that case, the plaintiff had filed his suit in the United States District Court for the State of Washington, upon the assumption that the land at a certain point underneath the Columbia River was within the State of Washington. The defendant had answered, and also filed a counter-claim. After this counter-claim was filed, the Supreme Court of the United States, in another case, rendered a decision, which held that this particular land was not within the State of Washington, but was within the State of Oregon, thus depriving the District Court for the State of Washington of jurisdiction over the land in controversy, although it still had jurisdiction over the parties. The plaintiff, therefore, after this decision was

rendered, moved to dismiss his case. The motion was denied by the lower court. The case was tried and a judgment had in favor of the defendant upon its counter-claim. This decision was reversed by the Circuit Court of Appeals on the ground that the motion to dismiss should have been granted, and upon appeal to the Supreme Court, the Circuit Court of Appeals was upheld. The Supreme Court held that inasmuch as the plaintiff could not possibly recover in the suit what he had anticipated at the time he filed the suit, and had been put in an unexpected position, he had a right to dismiss the case, notwithstanding the fact that a counter-claim had been already filed.

The parallel between this case and the petitioner's in the court of Claims is striking. When petitioner filed its suit in the Court of Claims, so far as there had been any decision on the questions involved, it had been held (a) by the Court of Claims in the College Point Boat case (Exhibit "A" to petition) that anticipated profits could be recovered in cases against the United States similar to petitioner's; and (b) it had been held by the Federal Courts, with but few exceptions, that contracts of the Fleet Corporation were contracts of the United States. With these decisions to guide it, the petitioner sued the Government on the Fleet Corporation's contracts, assuming that they were Government contracts, and not only claimed anticipated profits, but claimed other items which in a suit against the United States, as the law is now firmly established, were properly claims for "just compensation" (such as the item of $906,416.26 claimed as loss on materials purchased for cancelled ships—see Exhibit D—Volume I, page 11) upon which suit could only be brought after a determination as provided by the Acts of Congress.

After suit was filed, not only did the Court of Claims reverse its former decision in the College Point Boat case (see Meyer Scale Co. *v.* United States, 57 Ct. Cls. 26, and Russell Motor Car Co. *v.* United States, 57 Ct. Cls. 464, the latter affirmed by this Court in 261 U. S. 514) but the Supreme Court of the United States, in the cases of Sloan Shipyard Corporation and the Astoria Marine Iron Works (particularly the latter) *v.* United States Shipping Board Emergency Fleet Corporation, 258 U. S. 549, established the law to be that under contracts with the Fleet Corporation similar to the Skinner and Eddy Corporation contracts, suit would properly lie against the Fleet Corporation.

The net amount for which judgment had been claimed in the Court of Claims was $17,493,488.97. As the amount claimed by the petitioner in that suit as anticipated profits (Exhibit D, Volume I, page 11), together with the items which in a suit against the United States would properly be claims for just compensation, were more than the net amount claimed by plaintiff, it was obvious that if plaintiff could recover neither one of these items in the suit filed, then it could recover nothing at all in that suit.

Since the decision of this court in the Russell Motor case, made on April 9, 1923, 261 U. S. 514, it is settled law that in actions of this character anticipated profits cannot be recovered. This same case also settled the law that the act of June 15, 1917 (40 Stat. L. 183), gave the President, or his nominee, power to cancel Government contracts, and the decision further points out that where there is such cancellation of a Government contract the only remedy is for just compensation in the manner provided by the statute. The part of the statute with regard to just compensation is as follows:

> "Whenever the United States shall cancel, modify, suspend, or requisition any contract, make use of, assume, occupy, requisition, acquire, or take over any plant or part thereof or any ship, charter, or material, in accordance with the provision hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

It is well established that when the Government provides a remedy against itself, the procedure outlined is exclusive (United States vs. Babcock, 250 U. S. 328), and such procedure must be followed literally; Rock Island A. & L. Co. v. United States, 254 U. S. 141.

It follows, therefore, that to entitle a claimant to sue the Government for just compensation for the cancellation of contracts such as those involved here, such just compensation must have been determined by the President (now by the Shipping Board—see statute of June 5, 1920, 41 Stat. L. 989) prior to filing suit therefor. The record here shows that no determination of just compensation was made until February 14, 1923 (see Exhibit D, Volume II, page 11), or nearly two years after the petition was filed in the Court of Claims. It follows then that at the time the petition was filed, no cause of action existed as to just compensation, and this defect could not be corrected by amendment, be-

cause no amendment could change the fact that at the time the suit was brought no cause of action existed. (American Bonding and Trust Co. v. Gibson Company, 145 Fed. 871.) It necessarily follows, therefore, that in the suit filed in the Court of Claims against the Government the petitioner could not possibly have recovered either anticipated profits or just compensation, and that therefore its whole suit must have failed, because, from petitioner's own statement in the petition itself, it affirmatively appears that if the items of anticipated profits and just compensation are eliminated, there would have been a balance in favor of the Government, and therefore petitioner could have made no recovery at all.

The decision of this court in the Russell Motor case, made on April 9, 1923, caused the petitioner to realize that it had mistaken its remedy and that it could not possibly recover any affirmative judgment in the case it had filed. It therefore, two days after the Russell Motor decision, filed its motion to dismiss in the Court of Claims, and at the same time filed, or attempted to file, a *praecipe* for dismissal, this latter document being refused acceptance by the Clerk.

It was exactly so in the McGowan case, where the plaintiff, after the decision of the Supreme Court, found he could not recover what he had set out to recover, and therefore filed his motion to dismiss, which motion the Supreme Court held should have been allowed, notwithstanding the fact that a counter-claim was already on file. The McGowan case is therefore authority for holding in the present case that even if the Government had filed its counter-claim prior to the motion to dismiss, that nevertheless the motion to dismiss ought to have been granted. How much stronger is the right to dismiss when at the time the

motion was made no counter-claim had been filed or offered.

POINT II.

Petition is Barred from Proceeding in Court of Claims by Reason of Section 154 of the Judicial Code.

Section 154 of the Judicial Code (36 Stat. L. 1138) is as follows:

> "Sec. 154. No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect of which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States."

It is apparent that this statute effectually prevents petitioner from prosecuting the case in the Court of Claims for the reason that it has filed suit against the Fleet Corporation to recover on a large number of the same items that are set forth in the petition in the Court of Claims. This course of procedure is apparently the correct procedure on contracts of this character, as is evident by the cases hereinafter cited.

That this Section is a matter of jurisdiction, and therefore deprives the Court of Claims of the power to proceed with the case, is obvious from the nature of the powers given that Court. The Government of the United States is not liable to be sued except with its consent, and whatever limitations Congress places upon that consent limits the court's jurisdiction to the full extent of such limitations.

In the case of the United States vs. Waddell, 172 U. S. 48, it was held that the six-year statute of limitations against the United States was jurisdictional.

In Finn vs. United States, 123 U. S. 227, the matter is argued at some length by the Court. In that case a suit was brought upon a claim barred by the six-year statute. The Court said (page 231 of the Opinion):

> "We are of opinion that the claim here in suit—although by reason of its character 'cognizable by the Court of Claims'—cannot properly be made the basis of a judgment in that court. As the United States are not liable to be sued, except with their consent, it was competent for Congress to limit their liability, in that respect, to specified causes of action, brought within a prescribed period. * * * The duty of the court, under such circumstances, whether limitation was pleaded or not, was to dismiss the petition; for the statute, in our opinion, makes it a condition or qualification of the right to a judgment against the United States."

And finally the Court held that since the Government of the United States has assented to a judgment being rendered against it only in certain classes of cases, that any limitation upon the cases in which judgment could be rendered against it was a condition or qualification of the right to a judgment, and therefore extended to the powers of the court itself.

It is, therefore, certain that if the petitioner had asked the Court of Claims to reinstate the suit at the time the Government asked for such reinstatement, that the Court would have had no power to have made such order, and it must necessarily be true therefore that the Court had no power to make such order on the motion of the Government, and its order restoring

the case was an assumption of a power or jurisdiction which it did not possess. Moreover, the petitioner cannot appeal either from the order nor from a final judgment in the case, should one be rendered, because it is prohibited from doing so by this same Section of the Judicial Code.

> See also Corona Coal Co. vs. United States, decided by this Court January 7, 1924.

As petitioner cannot appeal either from the order nor from a judgment, it has therefore no remedy against the order complained of other than the writ prayed for in the petition herein.

POINT III.

Government's Offered Counter-Claim Was Too Late, Under the Rules of the Court of Claims

The Rules of the Court of Claims provide:

> Rule 29. "Demurrers and pleas must be filed within sixty days after the filing of the petition, unless the court extend the time."
>
> Rule 34. "Unless the Attorney General shall, within sixty days after the service of the petition upon him, appear and defend by filing a demurrer, plea, or answer, and by filing a notice of any counter-claim, set-off, claim of damages, demand, or defense in the premises, a general traverse of the petition shall be considered as entered on the part of the defendants, and the case shall be proceeded with the same as though an answer of general traverse had been filed."

Where rules of court are not inconsistent with positive law, they have the same effect as law.

United States v. Barber Lumber Co., *et al.*, 169 Fed. 184;
United States v. Freeman, 59 U. S. 30;
United States v. Pacheco, 63 U. S. 225;
United States v. Gozez, 64 U. S. 326.

In petitioner's case, notwithstanding the rules above quoted, the Government did not file its counter-claim, or offer to file it, until approximately twenty-two months after the petition had been filed. In its application to file a counter-claim at such a late date no excuse was given or even suggested as to why the counter-claim had not been offered within the proper time. While the Court of Claims could have undoubtedly set aside its rules upon a proper showing being made, such rules could not be ignored unless some adequate reason was given therefor, and particularly is this true when the counter-claim has not only not been offered within the time required by the rules, but is not offered at all until petitioner has moved to dismiss his case.

POINT IV.

Counter-Claim by Government Can Only be Allowed Against a Claimant Against the Government.

Section 145 of the Judicial Code (36 Stat. L. 1137) provides as follows:

> "Sec. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters: * * *
>
> "Second: All setoffs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States *against any claimant against the Government in said Court.* * * *"
> (Italics ours.)

The language is perfectly plain. When a claimant moves for dismissal of a cause, he is no longer a claimant against the Government in said court, and there is therefore no longer any jurisdiction in the court to receive, hear or determine any such counter-claim.

The Constitution of the United States guarantees to its citizens the right to trial by jury in lawsuit involving claims of a legal nature. All statutes in any way limiting or qualifying such right must receive such reasonably strict construction as will give full effect to the constitutional guaranty. It is undoubtedly true that any claimant who comes into the Court of Claims and avails himself of the privilege of suing the Government, thereby waives the right to a jury trial on any claim which the Government may set up against him. But when a petitioner dismisses his claim prior to the assertion of the Government of any counter-claim, he ceases to be a claimant.

The notice to dismiss was notice to the court and to the Government that petitioner was no longer a claimant; that it claimed nothing in said suit.

The Court of Claims is not a court of general jurisdiction but a special statutory court. There are, therefore, no general presumptions in its favor in regard to jurisdiction. Undoubtedly the statute creating the court and defining its powers and jurisdiction is to receive a reasonable construction so as to reasonably carry out the purpose which Congress must have had in mind in creating the court. That purpose, however, is not to be lost sight of. That purpose was to create a court where the citizen may sue the Government. The primary, and practically the only purpose of the act is to afford to the citizen a tribunal where he may assert causes of action against the Government as to which without such court he would be remediless. This, as

stated, is the only real object of creating the court. The section giving to the Government the right to file a setoff is purely a dependent and subordinate clause intended to be defensive only and never offensive. It is a shield for the Government and not a sword. To hold, therefore, that the Government may sue in the Court of Claims a citizen who has taken the proper steps to get out of the court, and is no longer the wager therein of a claim against the Government, would be to give the Court by judicial construction, a purpose and a power contrary to the obvious meaning of the act which Congress must have had in mind in establishing such a Court.

When plaintiff filed its motion to dismiss its petition, and when this motion to dismiss was granted, and when the petitioner followed this dismissal by commencing a new suit against the Fleet Corporation, thus putting it out of its power to file or prosecute a claim against the United States, it ceased as effectually as possible to be a claimant against the United States. There can be no more effectual manner of ceasing to be a claimant than this, and to permit the Government now to file a counter-claim and to compel the petitioner to answer that counter-claim in the Court of Claims, is in effect, permitting the Government to file an absolutely new action against the petitioner in the Court of Claims, and to prosecute that action when the petitioner is barred from presenting its own case, even as to $3,130,433.46 which the Shipping Board allowed as just compensation.

POINT V.

Contracts Sued Upon Are With Fleet Corporation and Not with United States; Therefore Case Was Never Properly in Court of Claims.

In the Sloan and Astoria cases, 258 U. S. 549, it was held by this court that contracts such as these are with the Fleet Corporation and not with the United States. On page 568 of the Opinion the Court said:

> "We attach no importance to the fact that the second contract, alleged to have been illegally extorted, was made with the Fleet Corporation 'representing the United States of America.' The Fleet Corporation was the contractor, even if the added words had any secondary effect."

Again on page 569:

> "The whole frame of the instrument seems to us plainly to recognize the Corporation as the immediate party to the contract."

Since this decision of this Court there have been many decisions of the lower United States Courts to the same effect.

In the case of the United States v. Matthews, 282 Fed. 266, the Circuit Court of Appeals for the Ninth Circuit held that a cause of action such as is attempted to be set up in the counter-claim here, is in favor of the Fleet Corporation and not in favor of the United States, and sustained a demurrer to a complaint by the United States on that ground, citing the Astoria case as its authority.

In the decision rendered April 16, 1923, in the case of the United States vs. Wood, *et al.*, 290 Fed. 109, the

Circuit Court of Appeals for the Second Circuit used the following language (p. 115):

> "We can not, however, conclude this opinion without stating our conviction that the theory upon which the bill was filed is wholly erroneous and that the debt herein involved is not in law a debt due to the United States, and that the complaint does not state a cause of action. The debt set forth in the complaint is one due, not to the United States, but to the Fleet Corporation as principal and independent contractor."

In the case of John G. Wright & Company vs. United States Shipping Board Emergency Fleet Corporation, 285 Fed. 647, Judge Hand said:

> "This argument does not I think sufficiently regard the fact that the action is not against the United States but against the Fleet Corporation."

See also the following cases:

Atlantic Corporation v. United States Shipping Board Emergency Fleet Corporation, 286 Fed. 222.

United States Shipping Board Emergency Fleet Corporation v. Banque Russo Asiatique, 286 Fed. 918.

There are many provisions in the contracts between Skinner and Eddy Corporation and the United States Shipping Board Emergency Fleet Corporation which indicate more strongly than the contracts in the cases above cited that these contracts are contracts with the Fleet Corporation and not contracts with the United States.

A good part of plaintiff's claim as well as the alleged set-off the Government has filed grew out of correspondence in which the Fleet Corporation did not even purport to be representing the United States.

On May 11, 1918, the Fleet Corporation wrote a letter to petitioner (see page 236 of Volume I, Exhibit D), which letter is a contract by reason of the fact that it is accepted and signed by the petitioner, in which the Fleet Corporation undertakes to lease and sell to petitioner under certain terms and conditions set forth in the letter, a certain shipyard which it had just purchased under a letter of May 10, 1918 (page 239 Vol. I, Exhibit D.)

It is significant that the contract of May 11, 1918, does not mention the United States at all. The Fleet Corporation does not say that it is acting for the United States. The contract is written apparently for the Fleet Corporation alone, and it must have been with the Fleet Corporation, as a corporation, because at that time it had no Governmental authority either to lease or to sell the plant as it undertook to do. Neither the Fleet Corporation nor the Shipping Board were given any authority to sell or lease real estate belonging to the United States until the Act of June 5, 1920. Of course, as a corporation, with all the general powers of any corporation, it had full authority to lease and to sell this plant. The lease itself (see page 459 of Exhibit D, Volume 1), does purport to have been made by the Fleet Corporation, "representing the United States of America." In this respect it is similar to the Astoria contract, but nowhere else in the lease is there anything to indicate that it is not a lease of the Fleet Corporation instead of the United States. In fact, when it is considered that the Fleet Corporation had no Congressional authority to make this lease, the conclusion is inevitable that the lease was a lease of the Fleet Corporation itself, and not a lease of the United States.

It is fundamental that agencies of the Government

can not dispose of Government property except in accordance with some act of Congress.

This contract of May 11, 1918, is the foundation of by far the larger part of the dealings between the Fleet Corporation and this claimant. It provides for the Construction of fifty ships at a contract price of almost $100,000,000.00, and it was contracts for some of these same ships which were afterwards cancelled, and which gave rise to a large portion of plaintiff's claim. This contract is an indivisible contract. Without the contract to lease and sell the shipyard, the petitioner could not have undertaken to build the ships, because a large number of the ships were to be built in the yard so agreed to be leased and sold. It was part of the consideration for building the ships that the shipyard itself was to be sold to petitioner, and it is obvious that the petitioner could not have undertaken to build these ships at all without the rest of the contract for the leasing and sale of the shipyard. It then follows that as the Fleet Corporation, representing the Government, had no authority to either lease or sell this yard, it must have been acting for itself and in its own corporate capacity, and not as a representative of the Government, when it made this contract. Either this contract, involving the purchase of a $4,000,000.00 shipyard and the construction of almost $100,000,000 worth of ships, is a contract of the Fleet Corporation, or else it is absolutely void for lack of authority to execute it.

We therefore urge that these contracts are with the Fleet Corporation and not with the United States, and therefore the Court of Claims has no jurisdiction over either the original petition or the counter-claim filed by the Government.

POINT VI.

Wrongful Order of Court Deprived Petitioner of Its Right to Trial by Jury, and Writ Asked Is Proper Remedy for This Wrong.

The only possible object in reinstating the case after once dismissing it is to allow the Government to file and prosecute its affirmative action against petitioner in the Court of Claims, and thus deprive petitioner of its right to trial by jury.

The Government could, of course, at any time file suit in the United States Courts other than the Court of Claims, and have it determined in such action whether the petitioner was or was not indebted to the Government in the amount claimed, or in any other amount, but on that issue and in that case the petitioner would have a right to trial by jury.

In the Matter of Simons, 247 U. S. 231, where the lower court had transferred a certain cause from the law side of the court to the equity side of the court, thus depriving the appellant of the right to trial by jury, the court said:

> "If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake";

and the writ was granted requiring the lower court to restore the cause to the law side.

In Ex Parte Peterson, 253 U. S. 300, the lower court had appointed an auditor with instructions to make an investigation as to the facts, hear the witnesses, ex-

amine the accounts, and make a report. The plaintiff therein applied to the Supreme Court for a writ of mandamus and/or prohibition commanding the lower court to proceed with the trial in the regular way, and that it be prohibited from proceeding under the order. The Supreme Court said, page 305 of the Opinion:

> "It is insisted that the District Court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him and his report should be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the Circuit Court of Appeals; and that the writs prayed for may not be used merely to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was said in Ex Parte Simons, 247 U. S. 231, 239, 'be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by' a proceeding 'that ultimately must be held to have been required under a mistake.' "

The Court then held that the order did not deprive plaintiff of his right to trial by jury, and therefore denied the writ.

In this case, as the order complained of was a wrongful order which deprived petitioner of its right to trial by jury, it should be dealt with by this Court now. It would be a great hardship if the plaintiff should be compelled in the Court of Claims to defend against the Government's suit, going through months, and perhaps years, of taking testimony of innumerable witnesses, and long, complicated, and voluminous accounts examined and put in evidence, and then find that all this labor had been for naught because of the wrong-

ful order of the court in reinstating the cause to permit the Government to file a counter-claim seven months after the original cause had been dismissed.

CONCLUSION.

We have, we think, shown:

First: That petitioner had a right to dismiss its case in the Court of Claims;

Second: That after the Court had dismissed said case it had no power to reinstate it, being prohibited by Section 154 of the Judicial Code;

Third: That the only effect of the order is to permit the Government to sue petitioner affirmatively in the Court of Claims and compel petitioner to defend against said claim while petitioner is barred from presenting its own case;

Fourth: That the contracts are with the Fleet Corporation and not with the United States, and therefore not cognizable in Court of Claims;

Fifth: That petitioner cannot appeal either from the order or from a final judgment in the case on account of Section 154 of the Judicial Code, and therefore has no other remedy but the writ prayed for;

Sixth: That, in any event, the order was wrong and deprived petitioner of the right to trial by jury on the Government's affirmative case.

It is respectfully submitted that the writ as prayed for should be issued.

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In the Supreme Court of the United States.

OCTOBER TERM, 1928.

ORIGINAL.

IN THE MATTER OF SKINNER & EDDY CORPORATION, PETITIONER.

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, ETC.

JAMES M. BECK,
Solicitor General.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1928.

INDEX TO CITATIONS.

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At this stage of the proceedings it is not in order to raise any issue with respect to the facts alleged in the petition. These facts are not admitted and if the writ should be granted they will be controverted in so far as erroneously or incompletely alleged.

It is, however, desired in order to avoid wasting the time of the court to point out sufficient reasons why the motion for leave to file the petition for a writ should be denied upon the facts as alleged and under well-settled rules of law. The opinion of the Court of Claims, under which the motion of the petitioner to dismiss the case in the Court of Claims was denied and the counterclaim of the United States filed, is hereto annexed and marked "Exhibit A."

Attention is called to the following facts which appear upon the face of the petition. The petition was filed in the Court of Claims on June 15, 1921—a copy of the petition was filed by the petitioner in this court on this application. As was expressly held by the Court of Claims in its opinion the petition included causes of action against the United States based on alleged breaches of contract specifically alleged to have been made by the United States through its agent the Fleet Corporation. Without discussing the point as to whether the Court of Claims had jurisdiction to entertain so much of the petition as related to other causes of action to recover just compensation for cancellation of contracts made in behalf of the United States by the Fleet Corporation as an agency selected by the President under the Emergency Shipping Fund Provisions of the Act of June 15, 1917, in the absence of allegations showing that prior to the filing of the petition an award had been made by the Shipping Board and 75 per cent thereof paid to the claimant, it is unquestionable that the Court of Claims had jurisdiction over some part of the causes of action alleged in the petition.

On April 11, 1923, the claimant presented to the clerk of the Court of Claims a *praecipe* for dismissal which the clerk refused to enter. (Petition, page 4.)

Thereupon the claimant made a motion to dismiss and on the following day the United States filed in the Court of Claims a motion for an order to withdraw its general traverse and file its answer and cross-bill.

(Petition, paragraph IV, page 5.) Claimant's motion to dismiss and the motion of the United States to file the counterclaim were set down for hearing for April 23, 1923. On that day these motions were argued and submitted, and on April 30, 1923, the Court of Claims entered an order dismissing the cause. (Petition, paragraph V, page 6.)

On June 9, 1923, before the expiration of the term of the Court of Claims at which the order of dismissal had been granted, the United States filed a petition for rehearing of the claimant's motion to dismiss the petition and for leave to file an answer alleging a set-off and counterclaim and to prosecute the same. (Petition, paragraph IX, pages 14–15.)

On October 22, 1923, the Court of Claims inadvertently entered an order denying the petition and motion of the United States to vacate the order of dismissal and overruling and denying the motion to file the counterclaim. (Petition, paragraph IX, page 16–17.) Thereafter, on the following day, October 23, the Court of Claims of its own motion vacated the order of October 22 and set the motion down for further hearing. The motion was argued and submitted on November 12, 1923, and on November 28, 1923, the Court of Claims filed its opinion and entered an order overruling the motion to dismiss and allowing the Government to file its counterclaim. (Petition, paragraph IX, page 17.) The counterclaim was thereupon filed on December 1, 1923. (Petition, paragraph IX, page 16.)

The petition of the United States in the Court of Claims is set out in the record from that court submitted as part of the papers on this application. From this petition in the Court of Claims it appears that the motion to vacate the order dismissing the petition was based upon the suppression by the claimant in the Court of Claims on its motion to dismiss of material facts which, if brought to the attention of the court, would necessarily have led to a contrary ruling, and further it was brought out that the Court of Claims in granting the application to dismiss the petition in April, 1923, did not render any decision on the motion of the United States for leave to file a counterclaim.

Upon these facts, which are in no way contradicted in the petition before this court, but, on the contrary, are taken from the petition and the record in the Court of Claims therewith submitted, it clearly appears that the Court of Claims had jurisdiction of the claim as filed with respect at least to certain causes of action therein set forth. As the court had jurisdiction of the claim, it necessarily, under Section 145 of the Judicial Code, had jurisdiction of the counterclaim. The court, in the month of April of its term, entered an order of dismissal, but while this order was final and while in force terminated the suit, nevertheless the Court of Claims had the same power during the term to modify or set aside this order as has any other court. Every decree of every court, whether final in form or not remains under the jurisdiction of the

court during the term at which it is entered and every court has power and jurisdiction during its term to entertain an application to vacate or set aside any decree which it may have entered during the term.

Every court also has the power, if a default in pleading has occurred, to open the default and permit the pleading to be filed.

The reasons for the delay in filing the counterclaim were fully explained, to the satisfaction of the Court of Claims. They are set out in the petition of the United States to vacate the order of dismissal and may be briefly summarized as follows:

While the cause was pending in the Court of Claims, the claimant, petitioner herein, made an application to the Shipping Board for an award of just compensation pursuant to the Act of June 15, 1917, as amended by the Merchant Marine Act 1920, Section 4. This proceeding was pending for about two years. During this period no action was taken in the Court of Claims. In February, 1923, the Shipping Board made an award in which it held that while the claimant was entitled to approximately Three Million Dollars of credits, there were off-sets and debits against these allowances amounting to several million dollars more, and the claim was therefore rejected. The General Counsel of the Shipping Board thereupon advised the Attorney General accordingly and recommended that a counterclaim should be filed. The Attorney General, through his assistants and deputies, thereupon prepared the counterclaim and it was presented to the Court of

Claims the day after the motion for leave to dismiss the claim had been filed but before the court had heard the motion.

As is apparent from the opinion of the Court of Claims the same grounds were raised before that court as are now attempted to be raised by this petition, namely, that the Court of Claims (*a*) never had jurisdiction of the claim, (*b*) had lost jurisdiction on the entry of the order dismissing the petition, (*c*) that the counterclaim was filed too late and in violation of the rules of the court. All of these contentions were decided adversely to the claimant.

The contention now made by the petitioner on this application, when analyzed, resolves itself down to the following manifestly untenable proposition.

That where the Court of Claims has jurisdiction of a claim and the United States files a counterclaim or prays leave to file a counterclaim, the claimant can defeat the jurisdiction of the Court of Claims over the counterclaim by bringing a suit in another court with respect to the same cause of action against the agent of the United States, out of whose dealings with claimant the cause of action against the United States arose. In other words, the claimant can take advantage of his own act and by bringing a suit in a District Court can nullify the provisions of the laws of the United States under which every claimant who comes into the Court of Claims submits himself to the jurisdiction of that court over any counterclaim which may be asserted by the United States.

Upon the questions of law involved on this application, the following points and authorities are submitted:

FIRST POINT.

The filing of the counterclaim by the United States in the Court of Claims, if not a matter of right, was a subject for the exercise of the judicial discretion of that court.

There is no rule in the Court of Claims limiting the time within which a counterclaim may be filed. It is so held by the Court of Claims. In this case the court said in its opinion (p. 20, infra):

> The rule of court does not limit the filing of a counterclaim, set-off, or demand by the Government to sixty days. Rule 29 provides for demurrer or plea within sixty days after the petition is filed "unless the court extend the time." Rule 34 provides that in the absence of demurrer, plea, or answer, or notice of a counterclaim or demand, the general traverse shall be considered as entered, but the allowance of the filing of a counterclaim or other of the defensive matters contemplated by section 145, Judicial Code, has been uniformly held to be within the court's discretion after the lapse of the sixty-day period. If it be said that the court has power to make rules of practice, it is yet true that it has not by its rules so limited the time of pleading the special defenses set forth in section 145 that such defenses may not thereafter be presented. In this connection section 175, Judicial Code, is of some moment.

This court does not prescribe the rules of practice in the Court of Claims. It is therefore submitted that in so far as the rules of the Court of Claims are not inconsistent with law, the Court of Claims must be presumed to know its own rules and to interpret them correctly. The applicable rule of law was settled many years ago in *Huske's case*, 46 C. Cls. 35. The point is also directly covered in *McElrath* v. *United States*, 102 U. S. 426, 440. It is not even essential that a counterclaim should be filed in order for the United States to prove offsets against the claimant. *Wisconsin Central Railroad*, 164 U. S. 190, 212; *Huse case*, 222 U. S. 496, 505.

Second Point.

The provisions of section 154 of the Judicial Code are matters of defense but can not be invoked by the claimant to deprive the Court of Claims of jurisdiction of a counterclaim.

Section 154 provides as follows:

> No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States. (36 Stat. L. 1138.)

In the case at bar the claimant in the Court of Claims, with knowledge of the fact that a counter-

claim was asserted by the United States, brought suit against the Fleet Corporation in a State Court in the State of Washington. This suit was begun immediately after the entry of the order of April 30, 1923, granting the claimant's motion to dismiss. (Petition, paragraph VIII, page 13.) The term of the Court of Claims, however, had not expired. Whatever the intention of the petitioner may have been with regard to defeating the counterclaim by bringing this suit, the petitioner now takes the position that the counterclaim can not be presented in the Court of Claims because the petitioner has brought suit against the Fleet Corporation and that suit is pending.

If this position were sound, it would necessarily follow that in any case brought in the Court of Claims by any claimant as soon as the United States filed a counterclaim and asked affirmative judgment, the jurisdiction of the Court of Claims to entertain the counterclaim could be defeated by the claimant bringing suit in another court against the agent of the United States through whom the contract sued on had been made, a manifestly absurd conclusion. The wording of Section 154 is not that the Court of Claims shall have no jurisdiction when any other suit is pending but that no person "shall file or prosecute" in that court any claim with respect to which he or his assignee has pending in any court any suit against any person acting or professing to act under authority of the United States. The statute is in the alternative but specifically relates to the rights of the

claimant only and not in any way to the rights of the United States with respect to its counterclaim.

Jurisdiction over the counterclaim is expressly conferred by the second paragraph of Section 145 of the Judicial Code which provides:

> That the Court of Claims shall have jurisdiction to *hear* and *determine* the following matters: * * * Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States *against any claimant against the Government in said court* * * *.

Section 146 provides as follows:

> Upon the trial of any cause in which any set-off, counterclaim, claim for damages, or other demand is set up on the part of the Government against *any person making claim against the Government in said court*, the court shall *hear and determine* such claim or demand *both for* and against *the Government* and claimant; and if upon the whole case it finds that the claimant is indebted to the Government *it shall render judgment to that effect* * * *.

Section 156 of the Judicial Code provides:

> Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, * * * within six years after the claim first accrues.

There is no limitation with respect to the time when the counterclaim of the United States may be filed, and the general rule doubtless applies that the United States is not bound by any Statute of Limi-

tations unless such statute is made clearly applicable to the Government under express terms by an Act of Congress.

THIRD POINT.

The remedy of the petitioner is not by mandamus or by prohibition but by appeal from such final judgment as the Court of Claims may enter on the counter claim.

It is only in exceptional cases where a trial court is clearly acting without jurisdiction that a writ of mandamus or prohibition will be granted. Where jurisdiction exists and the question is whether the exercise of jurisdiction has been rightful or wrongful, the party aggrieved will be left to his remedy by appeal. It is true that in a few exceptional cases mandamus has been granted, but it is submitted that the Court of Claims clearly acted within its jurisdiction and that its action was fully authorized by law and that if it committed any error, such error is clearly reviewable by appeal.

While, in the case at bar, the motion to vacate the order dismissing the claim was made at the same term, it may well be that this motion could have been made at any time within two years.

Section 175 of the Judicial Code provides that:

> The Court of Claims * * * within two years next after the final disposition of such claim, may, on motion, on behalf of the United States, grant a new trial * * * upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States.

The effect of this section is to abrogate, with respect to the Court of Claims, the general rule that a motion for a new trial must be made during the term of court at which final judgment is entered, and for that purpose to extend the term for a period of two years from the date of entry of final judgment for the claimant.

An appeal from the final judgment which will be ultimately rendered is expressly authorized by Judicial Code, Section 242.

It follows that the Court of Claims had jurisdiction to open its order of dismissal. Whether jurisdiction was rightfully exercised is a question not reviewable by mandamus or prohibition.

> *Exparte Peterson*, 253 U. S. 300, 318, 319.
> *In the Matter of Nineteen Barges*, and authorities there cited December 10, 1923 (not yet officially reported).

FOURTH POINT.

The motion for leave to file the petition should be denied.

JAMES M. BECK,
Solicitor General.
ROBERT H. LOVETT,
Assistant Attorney General.

CHAUNCEY G. PARKER,
General Counsel,
United States Shipping Board,

HENRY M. WARD,
Special Counsel,
United States Shipping Board,
Of Counsel.

EXHIBIT "A."

Court of Claims of the United States.—No. 199–A.—(Decided November 28, 1923.)

SKINNER AND EDDY CORPORATION *v.* THE UNITED STATES.

On Plaintiff's Motion to Dismiss.

CAMPBELL, *Chief Justice,* rendered the opinion of the court:

The plaintiff filed a motion to dismiss its case without prejudice to the bringing of another action. Its motion is as follows:

"Comes now the claimant in the above-entitled cause and moves to dismiss this cause without prejudice to the filing of a new action. The ground of said motion is that prior to the filing of the petition herein the petitioner had not presented to the President of the United States nor to his authorized agent the claim which is set out in the petition herein or any part thereof. The act of June 15, 1917, as interpreted by this court and the Supreme Court of the United States, provides that the President of the United States has authority to cancel such contracts as are set forth in the petition herein between petitioner and the United States, and said act further provides that whenever the United States shall cancel such contract it shall make just compensation therefor to be determined by the President, and if the amount so determined by the President is not satisfactory to the person entitled to receive the same, that then such person shall be paid 75 per cent of the amount so determined by the President and shall be entitled to sue the United States to recover such sum as added to said 75 per cent will make up such amount as will be just compensation.

This act, therefore, requires that claims such as are embodied in the present petition be presented to the President of the United States or to his duly accredited agent and that the President or such agent should determine the amount of just compensation prior to the filing of a suit in this court on such claim. As said claim was not presented either to the President or to his duly accredited agent, and therefore not acted upon, it follows that this court has no jurisdiction over this claim.

"Petitioner, therefore, asks that this cause be dismissed without prejudice to the filing of a new suit covering the same subject matter."

The petition was filed on the 15th of June, 1921, and nothing had been done in the case so far as the court docket discloses further than the entry by the clerk of the general traverse under the rules of the court. The plaintiff's motion to dismiss was filed on April 11, 1923, and the defendant's motion to set aside the general traverse and be allowed to plead was filed on the next day, April 12. These were sent to the Law Calendar and were heard together by the court on April 23, 1923. When the parties, by counsel, were heard in argument the plaintiff insisted it should be allowed to dismiss the case, and the defendent urged that the case be not dismissed and that the Government's counterclaim should be filed. The court entered an order allowing plaintiff's motion. A motion by the Government for a rehearing upon this motion was inadvertently overruled, but this action was vacated and the motion again set for hearing. This brought the entire question again before the court, and the question is upon the right of plaintiff to dismiss its action over the Government's objection and its motion to file a counterclaim or demand against the plaintiff.

We think it quite clear that a plaintiff filing his petition against the Government in the Court of Claims has no absolute right to dismiss the case over the objection of the defendant. This results from the terms of the statute under which alone the Government submits itself to suit. In *Schillinger's case*, 155 U. S. 163, 166, it is said:

"The United States can not be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination. Beyond the letter of such consent, the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the Government."

One of the "contingencies" here referred to is that the plaintiff may be confronted with some one or more of the matters mentioned in the jurisdictional act (section 145, Judicial Code). This section confers jurisdiction to hear and determine, first, enumerated claims against the Government, and "Second: All set-offs, counterclaims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court." This language is comprehensive and embraces any demand that the Government has against a claimant in the court. Referring to this second paragraph of section 145 the Supreme Court, speaking through Mr. Justice Harlan in *McElrath's case*, 102 U. S. 426, 440, say:

"Suits against the Government in the Court of Claims, whether reference be had to the claimant's

demand, or to the defence, or to any set-off or counterclaim which the Government may assert, are not controlled by the seventh amendment. They are not suits at common law within its true meaning. The Government can not be sued except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States. Congress, by the act in question, informs the claimant that if he avails himself of the privilege of suing the Government in the special court organized for that purpose, he may be met with a set-off, counterclaim, or other demand of the Government, upon which judgment may go against him, without the intervention of a jury, if the court, upon the whole case, is of opinion that the Government is entitled to such judgment. If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the Government to the exercise of the privilege. Nothing more need be said on this subject." See also section 146 of the Judicial Code.

In view of the statute and the decisions of the Supreme Court, as well as those of this court, the most that a plaintiff can invoke upon his motion for an order of dismissal, objected to by the Government, is the exercise of a sound discretion by the court in the circumstances of the particular case. The question was carefully considered in *Huske's case,* 46 C. Cls. 35, where the plaintiff sought to discontinue his suit, but before an order of discontinuance was made the Government filed its counterclaim. The court, in line with the decisions above cited, declared that

when a claimant seeks the jurisdiction of this court for a judicial determination of his rights against the United States he subjects himself to the decision and determination of whatever claims the United States may have against him which may be properly pleaded by way of set-off, counterclaim, or claim for damages. It was further said (p. 39):

"But when a party invokes the jurisdiction to obtain a money judgment against the United States he should know that if the Government has a counterclaim it is liable to be pleaded. For that matter, we may say incidentally, it ought to be pleaded as promptly as possible. With definite notice that a counterclaim actually exists, plaintiff ought to be held to meet the Government demand without being permitted to hurriedly get out of court and thereby evade the consequences of that which he knows he should meet somewhere. It would be an abuse of the sound discretion of the court to permit discontinuance under such circumstances if the statute is to have its proper meaning and effect."

There is nothing in the *Atlantic Construction Company case*, 35 C. Cls. 30, that militates against the conclusion in the *Huske case*. The latter points out the reason under the facts for the court's action in the earlier case, and this earlier decision held that the question was within the sound discretion of the court. In the *Huske case* the motion to discontinue was overruled, and we think that the rule was there correctly announced and should be adhered to.

The plaintiff's motion is set forth above. When it came to be heard the defendant opposed its allowance and apprised the court of the fact that there was a counterclaim, which the Government asked leave to

file. The court only considered the question stated and submitted in the motion. An examination of it shows that the plaintiff's petition asks relief on account of a number of transactions, a large part of which are not involved in the contracts alleged to have been canceled or attempted so to be. The petition avers that the five contracts were made by the Fleet Corporation "representing the United States" and in pursuance of the authority delegated to it by the President under specified acts of Congress. It is repeatedly averred that the Fleet Corporation represented the United States. It is averred that on the 25th day of April, 1919, the contracts were canceled by the Fleet Corporation "representing the United States." It is averred in paragraph 14 that plaintiff expended large sums in anticipation and belief that "the defendant" would in all respects comply with the terms of said contracts and that it was dispossessed of its plant and improvements thereto "by the defendant." It is averred that the Fleet Corporation "representing the United States" took over and removed large amounts of materials and that the alleged value thereof, many thousands of dollars, "is now due petitioner by the defendant."

It is alleged in paragraph 18 that the plaintiff built the fifteen vessels agreed to be built under one of the contracts and delivered them to the United States, "and the United States, through its proper officers and agents, accepted" them, but that the final payment due upon one of them, amounting to $184,500, was unjustly withheld from and is now due to petitioner from the United States. In paragraph 19 are claims of more than $600,000 alleged to be due and owing by the defendant. It further appears that claim is made for work and labor done, for repairs

made and for other items in large amounts which are claimed against the United States as the defendant in the suit.

The plaintiff invokes, among other things, the remedy provided by statute authorizing the suspension or cancellation of certain contracts. Act of June 15, 1917, 40 Stat. 183. This act provides for a liability of the Government. The averment of the petition is that the Fleet Corporation, representing the United States, ordered the cancellation of the contracts over the protest of plaintiff. Referring to this and other statutes amending it, 40 Stat. 535, 1022, it is averred in paragraph 6 of the petition as follows: "In pursuance of the authority delegated as aforesaid to the United States Shipping Board Emergency Fleet Corporation by the President of the United States under the acts of Congress aforesaid, the said United States Shipping Board Emergency Fleet Corporation, representing the United States, and in behalf thereof entered into five certain contracts with petitioner, said contracts being known as Supplemental Contract No. SC–10, and Contracts Nos. SC–175, SC–309, SC–324, and SC–447, all of which will be hereinafter more particularly referred to."

Judgment is asked against the United States as defendant for a sum in excess of seventeen millions of dollars. Manifestly the petition on the face of it avers claims against the United States. What may be the legal effect of the failure to present claim to the President or the duly authorized board, as stated in plaintiff's motion to dismiss, if such be the fact, it is not necessary to decide at this time. See *Houston Coal Company case*, 262 U. S. 361.

It is our view that the case of *Sloan Shipyards et al.* v. *U. S. Fleet Corporation*, 258 U. S. 549, does not

hold that the United States is not suable in this court on account of lawful transactions of the Fleet Corporation as the Government's agent. The case does decide that the agent itself could be sued—in other words, that "the agent, because he is agent, does not cease to be answerable for his acts." But this is not to say that a principal not himself exempt from judicial process may not be sued. The general rule is that where a party who discloses his principal and is known to be acting as an agent enters as such into such a contract he is not liable thereon in the absence of his express agreement to be bound thereby. *Whitney* v. *Wyman*, 101 U. S. 392; *Ford* v. *Williams*, 21 How. 287, 289. The real question in the case mentioned was upon the right to sue the Fleet Corporation under the averments in the pleadings in that case. It is said (p. 567): "The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act." See also *Clallam County* v. *United States et al.*, decided by the Supreme Court November 26, 1923, citing, among other cases, *King County* v. *Fleet Corporation*, 282 Fed. 950.

Whatever right plaintiff may have had to sue the Fleet Corporation under the contracts the fact remains that suit was brought against the United States in this court, and we do not think that the *Sloan Shipyards case* decides that such a suit can not be maintained.

The rule of court does not limit the filing of a counterclaim, set-off, or demand by the Government to sixty days. Rule 29 provides for demurrer or plea within sixty days after the petition is filed

"unless the court extend the time." Rule 34 provides that in the absence of demurrer, plea, or answer, or notice of a counterclaim or demand, the general traverse shall be considered as entered, but the allowance of the filing of a counterclaim or other of the defensive matters contemplated by section 145, Judicial Code, has been uniformly held to be within the court's discretion after the lapse of the sixty-day period. If it be said that the court has power to make rules of practice, it is yet true that it has not by its rules so limited the time of pleading the special defenses set forth in section 145 that such defenses may not thereafter be presented. In this connection section 175, Judicial Code, is of some moment.

The court has frequently rendered judgment dismissing a petition or reducing a recovery, in the absence of such a plea, where the facts developed an indebtedness or liability of the plaintiff to the Government. See *Wisconsin Central Railroad case*, 164 U. S. 190, 212; *Huse case*, 222 U. S. 496, 505; *extra pay cases* (*Spanish War*). It may be conceded that without a proper plea or answer setting up, or at least giving notice of, a counterclaim or other demand under the statute, there would be no sufficient basis for a judgment against a plaintiff for the excess of the counterclaim over the amount found to be due him. *Shrewsbury case*, 13 C. Cls. 183; *Boughton case*, 13 C. Cls. 284. But this consideration should not prevent the filing of a proper plea seeking affirmative relief when it is offered before evidence on either side is taken.

After considering the petition, the affidavits, and arguments adduced we are satisfied that the plain-

tiff's motion to dismiss should not have been allowed. That order will be vacated and another order entered overruling the motion to dismiss, and allowing the Government to file its counterclaim.

GRAHAM, *Judge;* HAY, *Judge;* DOWNEY, *Judge;* and BOOTH, *Judge,* concur.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

ORIGINAL, NO. 28.

IN THE MATTER OF SKINNER AND EDDY CORPORATION.

RESPONSE OF THE COURT OF CLAIMS AND THE JUDGES THEREOF TO THE RULE TO SHOW CAUSE WHY THE PRAYER OF THE PETITIONER FOR A MANDATE AGAINST SAID COURT SHOULD NOT BE GRANTED.

On January 28, 1924, a motion for leave to file a petition for a writ of mandamus, or, in the alternative, a writ of prohibition, against the Court of Claims, was granted by the Supreme Court, and at the same time a rule to show cause why the prayer of said petition should not be granted was issued, returnable April 7, 1924. A copy of the said petition and rule of the Supreme Court was served on the Court of Claims on February 9, 1924.

The prayer of the petition is for a writ of mandamus requiring the Court of Claims to restore its order of April 30, 1923, dismissing the case of the *Skinner and Eddy Corporation* v. *The United States*, No. 199–A, and to set aside its order of November

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28, 1923, vacating said order of dismissal of April 30, 1923, and prohibiting said Court from attempting to exercise any further jurisdiction over said case.

Therefore, in response to said rule to show cause why a writ of mandamus should not issue to compel the Court of Claims to obey the mandate of the Supreme Court, said court and the judges thereof say that they deny each and every allegation of the petition wherein the averments may be material to the questions involved, except as hereinafter admitted in this response.

(1) On June 15, 1921, the petitioner brought suit in the Court of Claims against the United States for an alleged balance, "exclusive of all just credits and offsets," of $17,493,488.97. According to the allegations of the petition (see petitioner's Exhibit D, Vol. 1), this suit grew out of balances due on the construction of ships delivered to the United States, bonuses for advanced deliveries of ships to the United States, extra labor, extra work, and repairs on vessels constructed and delivered to the United States. Upon the facts alleged, this cause of action was within the general jurisdiction of the Court of Claims and section 145, Judicial Code. The principal part of the claim grew out of the cancellation of two contracts between the petitioner and the United States Emergency Fleet Corporation "representing the United States." The largest single item of the claim is for anticipated profits on the 25 vessels on which work was canceled,

amounting to $17,303,845.25. Copies of the contracts are attached to the petition filed in the Court of Claims. (See Exhibit D, Vol. 1, pp. 45–597.) It appears that these contracts were canceled or suspended or attempted so to be under the Emergency Shipping Fund provisions of the Act of June 15, 1917, Ch. 29, 40 Stat. 182, 183, as amended by Section 2, Paragraph (c) of the Merchant Marine Act of June 5, 1920, Ch. 250, 41 Stat. 989, conferring certain powers on the United States Shipping Board, as follows:

> Whenever the United States shall cancel, modify, suspend, or requisition any contract, make use of, assume, occupy, requisition, acquire, or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code. (40 Stat. 183.)
>
> (c) As soon as practicable after the passage of this Act the board shall adjust, settle, and

> liquidate all matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President by any such Act or parts of Acts; and for this purpose the board, instead of the President, shall have and exercise any of such powers and duties relating to the determination and payment of just compensation: *Provided*, That any person dissatisfied with any decision of the board shall have the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the Acts hereby repealed. (41 Stat. 989.)

(2) On August 15, 1921, no plea, answer, or notice of any counterclaim having been filed by the Government, a general traverse was entered by the Clerk of the Court of Claims under Rule 34 of said Court. Thereafter, no evidence was taken in said case, nor brief filed, nor any other proceedings looking to its disposition had until the petitioner's motion to dismiss the case was filed on April 11, 1923. During that period the docket of the Court of Claims was called regularly twice a year and the attention of petitioner called to the condition of the case.

(3) On April 11, 1923, the petitioner filed in the clerk's office a motion to dismiss its said suit "without prejudice to the filing of a new suit" upon the ground that the claim prior to the filing of the petition in the Court of Claims had not been presented "to the President or to his duly accredited agent" and acted on, and the court had therefore no jurisdic-

tion of this claim under the Act of June 15, 1917. The said motion is as follows:

> Comes now the claimant in the above-entitled cause and moves to dismiss this cause without prejudice to the filing of a new action. The ground of said motion is that prior to the filing of the petition herein the petitioner had not presented to the President of the United States nor to his authorized agent the claim which is set out in the petition herein or any part thereof. The act of June 15, 1917, as interpreted by this court and the Supreme Court of the United States, provides that the President of the United States has authority to cancel such contracts as are set forth in the petition herein between petitioner and the United States, and said act further provides that whenever the United States shall cancel such contract it shall make just compensation therefor to be determined by the President, and if the amount so determined by the President is not satisfactory to the person entitled to receive the same, that then such person shall be paid 75 per cent of the amount so determined by the President and shall be entitled to sue the United States to recover such sum as added to said 75 per cent will make up such amount as will be just compensation. This act, therefore, requires that claims such as are embodied in the present petition be presented to the President of the United States or to his duly accredited agent and that the President or such agent shall determine the amount of just compensation prior to the filing of a suit in this court on such claim. As said claim

> was not presented either to the President or to his duly accredited agent, and therefore not acted upon, it follows that this court has no jurisdiction over this claim.
>
> Petitioner, therefore, asks that this cause be dismissed without prejudice to the filing of a new suit covering the same subject matter.

(4) On April 12, 1923, the following motion was filed in the clerk's office on behalf of the Government:

> Now comes the defendant by its Attorney General and moves the court for an order granting to it the right to withdraw its general traverse heretofore filed in this cause and to file its answer and cross bill.

These two motions were in regular course brought to the court's attention and were on April 16, 1923, sent by the court to its Law Calendar for hearing on Monday, April 23, 1923.

(5) On April 23, 1923, the motions were argued, and at that time the court was informed by the attorney representing the Government that the purpose of its motion was to obtain leave to file and insist upon a counterclaim or demand which the Government claimed to have against the petitioner. The attorney for the petitioner argued, and he admits he "actually said" in his argument of the motion to dismiss, "that this court had no jurisdiction of a petition for just compensation until such compensation had been determined (by the Shipping Board) and that the present petition therefore must be dismissed because it was prematurely filed." (Exhibit D, Vol. II, pp. 41, 42.) During this hearing

and argument it was not stated or shown to the court that the claim in question had been presented to the Shipping Board on December 31, 1920, more than six months before said suit was filed, nor was it made to appear that the Shipping Board, on February 14, 1923, had made an award on said claim by which it was determined that the petitioner was entitled to receive the sum of $3,130,433.46 from the United States and that the United States was entitled on its counterclaim to receive a sum in excess of $4,700,000 from the petitioner. (Exhibit D to the petition herein, Vol. II, pp. 11, 12, 13, 17, 18, 20, 21, 23, 24.) Nor did the attorney for petitioner mention that he had made a written request for a certified copy of the resolutions of said Board (Exhibit D, p. 21), and that the Shipping Board, on March 15, 1923, had mailed a certified copy of the resolution and award to the petitioner (Exhibit D, Vol. II, pp. 18, 19). This was nearly a month before the motion to dismiss was filed.

At the time the motion to dismiss was argued it was not brought to the attention of the court by counsel for either party or otherwise that the causes of action alleged in the petition included causes of action to recover damages for alleged breaches of shipbuilding contracts specifically alleged to have been made between the claimant and the United States, nor that, as was the fact, such causes of action were within the general jurisdiction of this Court under Section 145 of the Judicial Code and not within the special jurisdiction respecting just com-

pensation conferred by said Act of June 15, 1917, 40 Stat. 183, as amended by the Merchant Marine Act, 1920, 41 Stat. 989.

At the time the motion to dismiss was argued, it was not made to appear that the attorney representing the Government had been informed either that the claim for an award of just compensation had been prosecuted before the Shipping Board, or that the Shipping Board had made any award thereon; nor did said attorney, or anyone else, inform the court of such action by the Shipping Board. (Exhibit D, Vol. II, pp. 23, 24.)

On April 30, 1923, the Court of Claims entered an order allowing plaintiff's motion and dismissing the petition. At the time this order was entered the court had no information of the award of the Shipping Board.

(6) The petition herein shows that on May 1, 1923, the day after the suit was dismissed in the Court of Claims, the petitioner filed a suit against the United States Shipping Board Emergency Fleet Corporation in the State Court of the State of Washington, at Seattle, for $9,129,401.14. On the same day that suit was filed service, as required by State law, was made on the Emergency Fleet Corporation.

(7) On June 9, 1923, at the same term of the Court and within the time allowed by the rule of court, the Government filed its motion in the clerk's office for a reargument of petitioner's said motion of April 11, 1923, to dismiss without prejudice and to vacate the order of dismissal of April 30, 1923, "and for an order au-

thorizing the filing by the United States of a set-off and counterclaim pursuant to the motion filed herein April 12, 1923, and not passed upon by the court." This motion, with its accompanying affidavits, was the first pleading which mentioned the filing of the claim with the Shipping Board and the final action of said Board thereon. The attorney for the Shipping Board who had at that time been placed in charge of the defense of the case had requested that notice be given him when the motion would be taken up for consideration. This notice, through some oversight, was not given, and on October 22, 1923, the motion was inadvertently overruled, but this order of October 22, 1923, was set aside and the motion set down for hearing. On that day both parties again appeared and plaintiff filed one or more affidavits, as appears from said Exhibit D, and after argument, in which the different matters contained in said motion of the Government, filed as aforesaid on June 9, 1923, were brought to its attention, the court, on November 28, 1923, entered the following order:

> This case having been heard upon the defendant's motion to vacate the order of the court dismissing the petition which was heretofore made upon the motion of the plaintiff and upon the motion of the defendant for leave to file its counterclaim or other demand against the plaintiff and upon the affidavits filed in connection with said motions, it is now ordered by the court that the order

heretofore made dismissing the petition be and the same is vacated and set aside and the said case is restored to the docket. It is further ordered that the defendant's motion for leave to file its counterclaim be and the same is allowed.

(8) It is true that the Court of Claims on April 4, 1921, held in the *College Point Boat Corporation* v. *The United States*, No. 34220, that where a contract between said Corporation and the Navy Department, dated October 25, 1918, was canceled by said Department on February 26, 1918, the contractor was entitled to recover anticipated profits, the cancellation being treated like any other breach of contract, and the petition states that "this decision was relied upon by petitioner in filing said suit in the Court of Claims on June 15, 1921, because it held (a) that a cancellation of such a contract was a breach, and (b) that the United States was liable in damages for such breach." It is also true that "the decision of the Court of Claims in the *College Point case* was not allowed by that court to stand, but was later entirely withdrawn and does not appear in the published reports of the Court of Claims." (Petition, p. 9.) The petitioner fails to state, however, that a motion for a new trial had been filed and was pending in the *College Point Boat Corporation case* on May 29, 1921, over two weeks before petitioner filed its said suit in the Court of Claims.

On May 21, 1923, upon the trial *de novo*, new findings of fact, judgment, and opinion were filed

in the *College Point Boat Corporation case*, in which it was held that the plaintiff was not entitled to anticipated profits.

(9) On January 9, 1922, the court in the case of *Meyer Scale Company* v. *The United States*, 57 C. Cls. 26, overruled its decision in the *College Point Boat Corporation case* as to anticipated profits, and on January 16, 1922, a new trial was allowed in the *Boat Corporation case*, the judgment set aside, and the findings withdrawn.

It is now claimed by petitioner that it was only after the decision by this court in the *Russell Motor Car Company case*, 261 U. S. 514, that it knew "authoritatively" that it could not secure such profits in the Court of Claims (Petition, p. 8), and petitioner emphasizes its allegation that "in bringing its said suit in the Court of Claims said petitioner was induced so to do by the holding of the Court of Claims in said *College Point case*" (Petition, p. 10). These grounds now urged for granting the writ of mandamus were not mentioned in petitioner's motion "to dismiss without prejudice," filed on April 11, 1923 (Exhibit D, Vol. II, pp. 4, 5), but the reason given was, as heretofore stated, that there had been no presentation of the claim to the President or his agent, or final action thereon by either, and that the Court was therefore without jurisdiction of the claim. If the plaintiff was misled by the court's first decision in the *College Point case*, holding there could be a recovery of anticipated profits, it is difficult to account for its dropping that item of

claim in its suit in the State Court at Seattle, where it alleges it has brought suit "for all of said items except the claim for anticipated profits." This suit was brought in the State Court of the State of Washington against the United States Shipping Board Emergency Fleet Corporation on May 1, 1923, the day after the said order of dismissal by the Court of Claims on April 30, 1923, and notice was served on the Fleet Corporation on the same day. (Petition, p. 13.) It seems at least probable that suit was brought in that Court in an effort to escape the counterclaim awarded by the Shipping Board on February 14, 1923.

(10) When the Court of Claims granted the petitioner's motion of April 11, 1923, and entered its order thereon April 30, 1923, it did not know, and was not informed, that an award had been made upon the claim by the Shipping Board, or that a claim had been filed with that Board by or for plaintiff. As appears from the motion itself, the ground upon which it was based was its statement that no such award had been made, and that the Court of Claims was therefore without jurisdiction of the suit under the Act of June 15, 1917, 40 Stat. 183, as amended by the Act of June 5, 1920, 41 Stat. 989. The petitioner had notice that an award had been made by the Shipping Board at the time its motion of April 11, 1923, to dismiss the petition was filed. It appears from the affidavit of the proper officer of the Shipping Board that petitioner or its attorney of record knew that the Shipping Board had made the award

aforesaid. (Exhibit D, Vol. II, pp. 18–21.) As appears from the foregoing recital, the Court of Claims at no time from and after April 11, 1923, lost jurisdiction of said cause, the motions for hearing having been made within the time limited by its rules. In addition to this fact, attention is called to Section 175 of the Judicial Code, which reads as follows:

> SEC. 175. The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion, on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law.

This Section 175 makes provision for a new trial while the claim "is pending before it," and also while it is pending "on appeal from it," but it does not stop there; it makes a general provision for a motion for a new trial "within two years, next after the final disposition of such claim." Final disposition of the claim was not made when the plaintiff's motion to dismiss was allowed on April 30, 1923. The court under its rules could reconsider this action. But if the disposition of the case had been final, the section in question would have kept the jurisdiction of the Court of Claims alive in the circumstances.

This court has held in a number of cases that it is not too late for the Court of Claims to grant a new trial under this act after an appeal has been taken to this court and it has assumed jurisdiction of the case. The only limitation upon the jurisdiction of the Court of Claims is that the motion for a new trial must be filed within two years after the judgment is rendered. See *Belknap* v. *United States*, 150 U. S. 588; *In re District of Columbia*, 180 U. S. 250, 253; *Fuller* v. *United States*, 182 U. S. 562, 569–572; *Sanderson* v. *United States*, 210 U. S. 168, 175.

The fact that the suit was brought so soon in a State court of the State of Washington against the Shipping Board Emergency Fleet Corporation, where there was no provision of law for the interposition of a counterclaim by the United States, in no way lessens the effect of plaintiff's action, or prevents the tentacles of Section 175 from attaching to the claim. The petition urges it would be "unjust" to require it to remain in the Court of Claims where the United States may "wage" a counterclaim against it; but this alleged injustice is not really so great when it is remembered that the same provision allowing this counterclaim to be "waged" was in full force when the petitioner originally filed its suit in the Court of Claims.

As stated in the opinion of the Court of Claims on said motion, the claim of the petitioner filed in the Court of Claims on June 15, 1921, embraces items for balances due on ships completed and delivered to the United States, claims for bonuses for advance

deliveries of ships to the United States, for extra labor and extra work and repairs on ships delivered to the United States, all of which items, as well as the counterclaim, were within the jurisdiction of the Court of Claims, under Sections 145 and 146 of the Judicial Code, and these items are in no way dependent upon presentation to or on action by the Shipping Board under the Act of June 15, 1917, *supra*, as amended by the Act of June 5, 1920, *supra*, in order to give jurisdiction to the Court of Claims.

In conclusion, the Court of Claims and the Judges thereof say that for the reasons set forth in the foregoing response of said court, the petition for a mandate should be dismissed, which is the prayer of your respondents.

The said opinion of the Court of Claims filed on November 28, 1923, is made part of this answer, and is attached hereto as Exhibit A.

THE COURT OF CLAIMS,
By EDWARD K. CAMPBELL,
Chief Justice.
FENTON W. BOOTH,
GEORGE E. DOWNEY,
JAMES HAY,
SAMUEL J. GRAHAM,
Judges.

JAMES M. BECK,
Solicitor General.
GEORGE M. ANDERSON,
Of Counsel.

EXHIBIT A.

COURT OF CLAIMS OF THE UNITED STATES.

No. 199–A.

(Decided November 28, 1923.)

SKINNER AND EDDY CORPORATION v. THE UNITED STATES.

On Plaintiff's Motion to Dismiss.

CAMPBELL, *Chief Justice*, rendered the opinion of the court:

The plaintiff filed a motion to dismiss its case without prejudice to the bringing of another action. Its motion is as follows:

"Comes now the claimant in the above-entitled cause and moves to dismiss this cause without prejudice to the filing of a new action. The ground of said motion is that prior to the filing of the petition herein the petitioner had not presented to the President of the United States nor to his authorized agent the claim which is set out in the petition herein or any part thereof. The act of June 15, 1917, as interpreted by this court and the Supreme Court of the United States, provides that the President of the United States has authority to cancel such contracts as are set forth in the petition herein between petitioner and the United States, and said act further provides that whenever the United States shall cancel such contract it shall make just compensation therefor to be determined by the President, and if the amount so determined by the President is not satisfactory to the person entitled to receive the same, that then such person shall be paid 75 per cent of the amount so determined by the President and shall be entitled to

sue the United States to recover such sum as added to said 75 per cent will make up such amount as will be just compensation. This act, therefore, requires that claims such as are embodied in the present petition be presented to the President of the United States or to his duly accredited agent and that the President or such agent should determine the amount of just compensation prior to the filing of a suit in this court on such claim. As said claim was not presented either to the President or to his duly accredited agent, and therefore not acted upon, it follows that this court has no jurisdiction over this claim.

"Petitioner, therefore, asks that this cause be dismissed without prejudice to the filing of a new suit covering the same subject matter."

The petition was filed on the 15th of June, 1921, and nothing had been done in the case so far as the court docket discloses further than the entry by the clerk of the general traverse under the rules of the court. The plaintiff's motion to dismiss was filed on April 11, 1923, and the defendant's motion to set aside the general traverse and be allowed to plead was filed on the next day, April 12. These were sent to the Law Calendar and were heard together by the court on April 23, 1923. When the parties, by counsel, were heard in argument the plaintiff insisted it should be allowed to dismiss the case, and the defendant urged that the case be not dismissed and that the Government's counterclaim should be filed. The court entered an order allowing plaintiff's motion. A motion by the Government for a rehearing upon this motion was inadvertently overruled, but this action was vacated and the motion again set for hearing. This brought the entire question again before the court, and the question is upon the right of plaintiff to dismiss its action over the Government's objec-

tion and its motion to file a counterclaim or demand against the plaintiff.

We think it quite clear that a plaintiff filing his petition against the Government in the Court of Claims has no absolute right to dismiss the case over the objection of the defendant. This results from the terms of the statute under which alone the Government submits itself to suit. In *Schillinger's case*, 155 U. S. 163, 166, it is said:

"The United States can not be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination. Beyond the letter of such consent, the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the Government."

One of the "contingencies" here referred to is that the plaintiff may be confronted with some one or more of the matters mentioned in the jurisdictional act (section 145, Judicial Code). This section confers jurisdiction to hear and determine, first, enumerated claims against the Government, and "Second: All set-offs, counterclaims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court." This language is comprehensive and embraces any demand that the Government has against a claimant in the court. Referring to this second paragraph of section 145 the Supreme Court, speaking through Mr. Justice Harlan in *McElrath's case*, 102 U. S. 426, 440, say:

"Suits against the Government in the Court of Claims, whether reference be had to the claimant's

demand, or to the defence, or to any set-off or counterclaim which the Government may assert, are not controlled by the seventh amendment. They are not suits at common law within its true meaning. The Government can not be sued except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States. Congress, by the act in question, informs the claimant that if he avails himself of the privilege of suing the Government in the special court organized for that purpose, he may be met with a set-off, counterclaim, or other demand of the Government, upon which judgment may go against him, without the intervention of a jury, if the court, upon the whole case, is of opinion that the Government is entitled to such judgment. If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the Government to the exercise of the privilege. Nothing more need be said on this subject." See also section 146 of the Judicial Code.

In view of the statute and the decisions of the Supreme Court, as well as those of this court, the most that a plaintiff can invoke upon his motion for an order of dismissal, objected to by the Government, is the exercise of a sound discretion by the court in the circumstances of the particular case. The question was carefully considered in *Huske's case*, 46 C. Cls. 35, where the plaintiff sought to discontinue his suit, but before an order of discontinuance was made the Government filed its counterclaim. The court, in line with the decisions above cited, declared that when a claimant seeks the jurisdiction of this court

for a judicial determination of his rights against the United States he subjects himself to the decision and determination of whatever claims the United States may have against him which may be properly pleaded by way of set-off, counterclaim, or claim for damages. It was further said (p. 39):

"But when a party invokes the jurisdiction to obtain a money judgment against the United States he should know that if the Government has a counterclaim it is liable to be pleaded. For that matter, we may say incidentally, it ought to be pleaded as promptly as possible. With definite notice that a counterclaim actually exists, plaintiff ought to be held to meet the Government demand without being permitted to hurriedly get out of court and thereby evade the consequences of that which he knows he should meet somewhere. It would be an abuse of the sound discretion of the court to permit discontinuance under such circumstances if the statute is to have its proper meaning and effect."

There is nothing in the *Atlantic Construction Company case*, 35 C. Cls. 30, that militates against the conclusion in the *Huske case*. The latter points out the reason under the facts for the court's action in the earlier case, and this earlier decision held that the question was within the sound discretion of the court. In the *Huske case* the motion to discontinue was overruled, and we think that the rule was there correctly announced and should be adhered to.

The plaintiff's motion is set forth above. When it came to be heard the defendant opposed its allowance and apprised the court of the fact that there was a counterclaim, which the Government asked leave to file. The court only considered the question stated and submitted in the motion. An examination of it shows that the plaintiff's petition asks

relief on account of a number of transactions, a large part of which are not involved in the contracts alleged to have been canceled or attempted so to be. The petition avers that the five contracts were made by the Fleet Corporation "representing the United States" and in pursuance of the authority delegated to it by the President under specified acts of Congress. It is repeatedly averred that the Fleet Corporation represented the United States. It is averred that on the 25th day of April, 1919, the contracts were canceled by the Fleet Corporation "representing the United States." It is averred in paragraph 14 that plaintiff expended large sums in anticipation and belief that "the defendant" would in all respects comply with the terms of said contracts and that it was dispossessed of its plant and improvements thereto "by the defendant." It is averred that the Fleet Corporation "representing the United States" took over and removed large amounts of materials and that the alleged value thereof, many thousands of dollars, "is now due petitioner by the defendant."

It is alleged in paragraph 18 that the plaintiff built the fifteen vessels agreed to be built under one of the contracts and delivered them to the United States, "and the United States, through its proper officers and agents, accepted" them, but that the final payment due upon one of them, amounting to $184,500, was unjustly withheld from and is now due to petitioner from the United States. In paragraph 19 are claims of more than $600,000 alleged to be due and owing by the defendant. It further appears that claim is made for work and labor done, for repairs made and for other items in large amounts which are claimed against the United States as the defendant in the suit.

The plaintiff invokes, among other things, the remedy provided by statute authorizing the suspension or cancellation of certain contracts. Act of June 15, 1917, 40 Stat. 183. This act provides for a liability of the Government. The averment of the petition is that the Fleet Corporation, representing the United States, ordered the cancellation of the contracts over the protest of plaintiff. Referring to this and other statutes amending it, 40 Stat. 535, 1022, it is averred in paragraph 6 of the petition as follows: "In pursuance of the authority delegated as aforesaid to the United States Shipping Board Emergency Fleet Corporation by the President of the United States under the acts of Congress aforesaid, the said United States Shipping Board Emergency Fleet Corporation, representing the United States, and in behalf thereof entered into five certain contracts with petitioner, said contracts being known as Supplemental Contract No. SC–10, and Contracts Nos. SC–175, SC–309, SC–324, and SC–447, all of which will be hereinafter more particularly referred to."

Judgment is asked against the United States as defendant for a sum in excess of seventeen millions of dollars. Manifestly the petition on the face of it avers claims against the United States. What may be the legal effect of the failure to present claim to the President or the duly authorized board, as stated in plaintiff's motion to dismiss, if such be the fact, it is not necessary to decide at this time. See *Houston Coal Company case*, 262 U. S. 361.

It is our view that the case of *Sloan Shipyards et al.* v. *U. S. Fleet Corporation*, 258 U. S. 549, does not hold that the United States is not suable in this court on account of lawful transactions of the Fleet Corporation as the Government's agent. The case

does decide that the agent itself could be sued—in other words, that "the agent, because he is agent, does not cease to be answerable for his acts." But this is not to say that a principal not himself exempt from judicial process may not be sued. The general rule is that where a party who discloses his principal and is known to be acting as an agent enters as such into such a contract he is not liable thereon in the absence of his express agreement to be bound thereby. *Whitney* v. *Wyman*, 101 U. S. 392; *Ford* v. *Williams*, 21 How. 287, 289. The real question in the case mentioned was upon the right to sue the Fleet Corporation under the averments in the pleadings in that case. It is said (p. 567): "The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act." See also *Clallam County* v. *United States et al.*, decided by the Supreme Court November 26, 1923, citing, among other cases, *King County* v. *Fleet Corporation*, 282 Fed. 950.

Whatever right plaintiff may have had to sue the Fleet Corporation under the contracts the fact remains that suit was brought against the United States in this court, and we do not think that the *Sloan Shipyards case* decides that such a suit can not be maintained.

The rule of court does not limit the filing of a counterclaim, set-off, or demand by the Government to sixty days. Rule 29 provides for demurrer or plea within sixty days after the petition is filed "unless the court extend the time." Rule 34 provides that in the absence of demurrer, plea, or answer, or notice of a counterclaim or demand, the general traverse shall be considered as entered, but the allow-

ance of the filing of a counterclaim or other of the defensive matters contemplated by section 145, Judicial Code, has been uniformly held to be within the court's discretion after the lapse of the sixty-day period. If it be said that the court has power to make rules of practice, it is yet true that it has not by its rules so limited the time of pleading the special defenses set forth in section 145 that such defenses may not thereafter be presented. In this connection section 175, Judicial Code, is of some moment.

The court has frequently rendered judgment dismissing a petition or reducing a recovery, in the absence of such a plea, where the facts developed an indebtedness or liability of the plaintiff to the Government. See *Wisconsin Central Railroad case*, 164 U. S. 190, 212; *Huse case*, 222 U. S. 496, 505; *extra pay cases* (*Spanish War*). It may be conceded that without a proper plea or answer setting up, or at least giving notice of, a counterclaim or other demand under the statute, there would be no sufficient basis for a judgment against a plaintiff for the excess of the counterclaim over the amount found to be due him. *Shrewsbury case*, 13 C. Cls. 183; *Boughton case*, 13 C. Cls. 284. But this consideration should not prevent the filing of a proper plea seeking affirmative relief when it is offered before evidence on either side is taken.

After considering the petition, the affidavits, and arguments adduced we are satisfied that the plaintiff's motion to dismiss should not have been allowed. That order will be vacated and another order entered overruling the motion to dismiss, and allowing the Government to file its counterclaim.

GRAHAM, *Judge;* HAY, *Judge;* DOWNEY, *Judge; and* BOOTH, *Judge*, concur.

SUBJECT INDEX.

TABLE OF CASES CITED.

ACTS OF CONGRESS CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

No. 28, Original

IN THE MATTER OF THE APPLICATION OF SKINNER & EDDY CORPORATION, PETITIONER, FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE HONORABLE THE UNITED STATES COURT OF CLAIMS

BRIEF ON BEHALF OF PETITIONER

STATEMENT OF CASE

This is a petition for the issuance of a writ of mandamus, or, in the alternative, a writ of prohibition, directed to the Court of Claims, prohibiting that court from further proceeding in the case of the Skinner & Eddy Corporation vs. The United States. That suit was filed in the Court of Claims on the 15th of June, 1921, and on April 30, 1923, was dismissed by order of that court on petitioner's motion, made April 11, 1923.

The complete complaint filed in the Court of Claims is found in Volume I of Exhibit "D."

On November 28, 1923, approximately seven months after the order of dismissal was made, the Court of Claims set aside the order, restored the case, and granted the United States permission to file a counter-claim. After the counter-claim was filed, the petitioner made a motion in this court for permission to file a petition for a writ of mandamus requiring the Court of Claims to restore the original order of dismissal or for a writ of prohibition prohibiting further proceedings in said case. The motion for permission to file the petition was granted, and the hearing now is upon the petition and preliminary rule issued by this court.

The complete proceedings and record in the Court of Claims on the petitioner's motion to dismiss and on the Government's motion to set aside the order of dismissal and for permission to file a counter-claim are found in Record Volume II.

STATEMENT OF FACTS

In order to present clearly to the court the issues involved, it will be necessary to recite, as briefly as may be, a statement of the facts which led up to the filing of the suit in the Court of Claims, and subsequently to the filing of the petition in this court.

In 1917, The Skinner and Eddy Corporation, the petitioner in this proceeding, was the owner of a shipbuilding plant in the City of Seattle, and there engaged in building steel ships as a commercial enterprise. During the years 1917 and 1918, five contracts were made between the Skinner and Eddy Corporation and the United States Shipping Board Emergency Fleet Corporation for the construction of steel

ships. (By typographical error on page 270, Volume I, record, contract 324 appears to bear date June 1, 1919, when in fact, the correct date is June 1, 1918, as shown by the petition on page 6, Volume I.) These were not the well known cost-plus contracts, but were contracts for the construction of certain definite ships according to certain definite plans and specifications, for certain definite lump sum prices. Besides these there were other contracts supplementary to and modifying the five just mentioned, and in addition, there was a contract in the form of a letter, dated May 11, 1918, which in many respects is the most important contract of all.

This letter is set out at page 236, Volume 1, and provides that the Fleet Corporation shall lease and sell to Skinner and Eddy a certain shipbuilding plant at Seattle, the purchase price being the exact amount the Fleet Corporation had paid for the yard. The letter further provides that the Fleet Corporation will award to Skinner and Eddy two contracts for building steel ships—one for 35 ships, and one for 15 ships. The contract price for these ships is specified, and in the aggregate reaches some $90,000,000. It is further provided that the thirty-five ships contracted for shall be constructed by the Skinner & Eddy Corporation in the shipyard to be purchased by it from the Fleet Corporation.

This letter also provides that Skinner and Eddy shall pay a rental for the yard of $125,000 per ship for each of the first thirty of these ships delivered under this contract, that these installments of $125,000 each shall be credited on the purchase price and when thirty installments aggregating $3,750,000 have been paid, the balance of the purchase price, something less than $500,000, shall be paid in one lump.

In pursuance of the terms of this letter, the two formal contracts for the construction of the thirty-five ships and the fifteen ships were entered into, and a formal lease of the yard was made to the Skinner and Eddy Corporation. This lease provided that in addition to making the payments called rent, but really installments of the purchase price, Skinner and Eddy Corporation should expend not less than $1,000,000 in improving and rebuilding the plant. (Pages 464-5, Vol. I.) As Skinner and Eddy Corporation had a contract to buy this yard, they would of course receive the benefit of the $1,000,000 to be expended in improving the yard.

In addition to these fifty ships, there were other contracts as before mentioned, making contracts for an aggregate of eighty-two steel vessels for an aggregate contract price approaching $150,000,000. Of these vessels, fifty-seven were actually constructed and delivered, and twenty-five were canceled by the orders of the Director-General, appearing in record Vol. I, pages 579-580. Controversies arose between the Fleet Corporation and Skinner and Eddy Corporation over these various transactions, and on the 15th of June, 1921, Skinner and Eddy Corporation began an action against the United States in the Court of Claims.

There were numerous items claimed in the complaint filed aggregating $24,167,389.55. Credit was given against this amount of $6,673,900 for money paid under the cancelled contracts, and materials and supplies furnished. The net judgment asked was $17,493,488.97.

Amongst the items claimed was one of $17,303,000 for anticipated profits on the twenty-five canceled ships. Some of the other items for which judgment

was asked included one for practically $1,000,000 alleged to be due and unpaid on the purchase price of ships completed and delivered. There were a variety of other items unnecessary to mention; but it is necessary to call particular attention to items of a different character than those involving a direct promise to pay money. These items are items which grew out of the cancellation of the contract for twenty-five ships. The most important of these items are as follows:

It is alleged that in order to get ready to construct these twenty-five ships, Skinner and Eddy Corporation purchased a large amount of material at a cost of over $2,000,000 and that when the ships were canceled, the Fleet Corporation took over and removed from petitioner's yard over $540,000 worth of this material that petitioner had paid for, and petitioner was compelled to sell the remainder of this material at a large loss, making a total loss on material purchased for the canceled ships of over $900,000.

It is further alleged that under its contract to purchase the shipyard from the Fleet Corporation it had paid some $500,000 on account of the purchase price, and had expended in betterments and improvements and in rebuilding this yard over $1,200,000; that the cancellation of the ships deprived the petitioner of paying for this shipyard in the only way it had agreed to pay for it; and that thereafter the Fleet Corporation forcibly ousted the petitioner from possession of the yard. Thus the Skinner and Eddy Corporation not only lost the $500,000 paid on account of the purchase price, but also lost the $1,200,000.00 which it had expended in improving the yard.

It will be observed that the item for anticipated profits claimed in the complaint amounted to $17,303,845.25; that there were other items which were claimed

as special losses for cancellation of the ships, such as the special losses of $900,000.00 on account of materials, $500,000.00 paid on account of the purchase price of the shipyard, and $1,200,000.00 expended in betterments on the same shipyard, the possession of which was later forcibly taken from petitioner; and that all of these items in the aggregate amounted to much more than the net amount for which judgment was asked. If, therefore, the petitioner could not recover in that suit either anticipated profits or these other items, which were in the nature of just compensation for cancelling the contracts, then it could recover no judgment at all because these items aggregated much more than the net amount for which judgment was prayed.

At the time this suit was filed in the Court of Claims on June 15, 1921, the decisions with reference to the legal rights of the parties under such contracts as these had not taken definite form, but the Court of Claims, in the College Point Boat case (page 37, Exhibit "A," attached to petition herein) had held that the United States was liable for anticipated profits for the cancellation of a contract made by the Navy Department after the Act of June 15, 1917 (40 Stat. L. 182), and subsequently canceled by it; and it had been held in several District Court cases that contracts such as have been recited were contracts of the United States, and upon which the United States was liable.

Sloan vs. United States Shipping Board Emergency Fleet Corporation, 268 Fed. 624;

Astoria vs. United States Shipping Board Emergency Fleet Corporation, 270 Fed. 635;

Sloan vs. United States Shipping Board Emergency Fleet Corporation, 272 Fed. 132.

With these decisions in mind, there being at that time no decisions by the Supreme Court of the United States to the contrary, the petitioner filed its suit June 15, 1921, in the Court of Claims against the United States, seeking as its main items of recovery, anticipated profits and items in the nature of compensation for cancellation of the contracts. After this suit had been filed in the Court of Claims, that court withdrew its opinion in the College Point Boat case, and in other cases decided that the United States had a right, under the Act of June 15, 1917, to cancel its own contracts, and when it did so it was not liable for anticipated profits.

Meyer Scale case, 57 Ct. Cls. 26;
Russell Motor case, 57 Ct. Cls. 464.

In the Russell Motor case this court, by decision of April 9, 1923 (261 U. S. 514), confirmed the decision of the Court of Claims that the United States could under the Statute of June 15, 1917, cancel its own contracts and that anticipated profits could not be recovered; but that the remedy was for just compensation in the manner provided in the Act, which required the amount of just compensation to be determined by the President before suit filed. This was the first decision by this Court covering the above subjects.

The suit was begun before jurisdictional conditions existed for suing for compensation for cancellation of contracts.

After the Court of Claims had reversed itself and decided the Meyer Scale case, Skinner and Eddy realized that should this court affirm that decision,

then the amount of just compensation must be determined as provided in the statute before any cause of action existed as to such just compensation. Petitioner, therefore, on March 29, 1922, nine months after the suit had been filed in the Court of Claims, presented a formal claim to the Shipping Board, which Board, on the 14th of February, 1923, made an order fixing the amount of just compensation to which petitioner was entitled at $3,130,433.46. (Pages 11, 12, 13, Vol. II, Record.) This order, made nearly two years after Skinner and Eddy had filed their suit, could not be set up by amendment to their complaint in the Court of Claims because no amendment could remedy the fatal defect that at the time the suit was filed, no cause of action existed.

The decision of this court in The Russell Motor case settled two propositions: first, that anticipated profits, as such, could not be recovered for cancellation of such contracts; and, second, that the only remedy against the United States was for *just compensation* for such cancellation to be determined as provided in the Act of June 15, 1917. It is well established that when the United States provides a remedy against itself, that procedure is not only the exclusive remedy, but must be literally followed. (United States vs. Babcock, 250 U. S. 328; Rock Island vs. United States, 254 U. S. 141.) Inasmuch as the act required a determination by the President (afterwards the Shipping Board), as a prerequisite to commencing suit, and as no determination of the amount of just compensation in this case had been made until long after the filing of the suit, it necessarily follows that the claim for just compensation could not be recovered in the suit filed.

It was therefore perfectly apparent that in the action filed in the Court of Claims the petitioner could not recover either anticipated profits or just compensation and therefore could not recover any judgment at all because with both these items eliminated, the petition itself showed that there would be no balance due the petitioner.

The suggestion that petitioner might recover just compensation for the cancellation of the contracts by an amended or supplemental petition filed in the pending case in the Court of Claims is without support in the authorities. The determination of the amount of just compensation by the executive agency (the Shipping Board) is a condition precedent to the commencement of a suit by the contractor, and is made so by the Statute (Act of June 15, 1917, as amended by Act of June 5, 1920). Any action begun in advance of that determination must necessarily fail as to such claims.

> "But courts can not perform executive duties, or treat them as performed when they have been neglected. They can not enforce rights which are dependent for their existence upon a prior performance by an executive officer of certain duties he has failed to perform. The right asserted by the claimant rests upon a condition unfulfilled."
> United States vs. McLean, 95 U. S. 750, 753; Rock Island vs. United States, 254 U. S. 141.

If a suit is prematurely brought, no amendment declaring upon a cause of action which did not exist when the suit was commenced can cure the defect. American Bond Co. vs. Gibson County, 145 Fed. 871 (C. C. A., 6th).

Petitioner's motion and praecipe for dismissal and the Court's subsequent action.

Two days after the Russell Motor decision was handed down by this court, therefore, the petitioner filed its motion to dismiss in the Court of Claims, and at the same time presented for filing its praecipe for dismissal, the latter document being handed to the Clerk, but refused filing by him. (Page 4, Petition.) At the time the motion to dismiss was filed, although the case had been pending for nearly two years, there had been no counter-claim filed or offered. The next day after the motion to dismiss had been filed, the Government's attorney made a motion for leave to file a counter-claim, but did not offer or set out the proposed counter-claim itself. (Record, p. 6, Vol. II.)

This motion for leave to file a counter-claim was not only made after the motion to dismiss had been filed but was too late under the Rules of the Court of Claims, which rules provide:

> Rule 29. "Demurrers and pleas must be filed within sixty days after the filing of the petition, unless the court extend the time."
>
> Rule 34. "Unless the Attorney General shall, within sixty days after the service of the petition upon him, appear and defend by filing a demurrer, plea, or answer, and by filing a notice of any counter-claim, set-off, claim of damages, demand, or defense in the premises, a general traverse of the petition shall be considered as entered on the part of the defendants, and the case shall be proceeded with the same as though an answer of general traverse had been filed."

The general traverse had been duly entered by the Clerk on August 15, 1921. (Record, page 4, Volume II.)

The Court of Claims took the motion to dismiss under advisement, and on the 30th of April, 1923, granted the motion, thus effectually denying the Government's motion to be permitted to file a counter-claim.

The court having granted petitioner's motion to dismiss, and there being no longer any suit pending in the Court of Claims, the petitioner on the next day, that is, the 1st of May, 1923, filed a suit in the State Court at Seattle, Washington, against the Fleet Corporation, as a corporation, covering, with some exceptions, the same grounds of complaint. Practically the only difference was that in the suit against the Fleet Corporation no claim for anticipated profits was made. This suit was transferred, upon motion of the Fleet Corporation, to the United States Court. Motion was made to quash service of summons, which was denied, and the Fleet Corporation was held to answer. (Exhibit "C," page 66 of petition herein.)

On the 9th day of June, 1923, forty days after the Court of Claims had granted the petitioner's motion to dismiss, and thirty-nine days after suit had been filed in Seattle against the Fleet Corporation, the Government filed in the Court of Claims a motion to set aside the order of dismissal, the grounds of the motion being substantially as follows:

That on the argument of the motion the attorney for petitioner had suppressed material facts; that the petitioner had commenced another suit in the State of Washington against the Fleet Corporation; that the witnesses and documentary evidence for the prosecution of the counter-claim are in Washington, D. C., and large expense would be incurred to send them to Seattle; that there is doubt as to the right of the Fleet Corporation to assert the counter-claim, but there is no doubt of the right of the United States to assert

such counter-claim; that the United States is entitled as a matter of right to prosecute the counter-claim, and the dismissal of the petition deprives it of this right.

The Court of Claims in granting the defendant's motion placed its decision upon the grounds that the counter-claim was not too late; that the petition on its face averred claims against the United States, and therefore the court had jurisdiction; that there is nothing in the Sloan, Astoria and Wood cases decided by this court which holds that a suit against the United States cannot be maintained on such contracts as these; and finally, that the plaintiff had no absolute right to dismiss but could only appeal to the discretion of the court, and the exercise of a sound discretion required that the original order of dismissal be set aside and the United States be permitted to file its counter-claim. (Record, Page 51 et seq., Vol. II.)

GROUNDS OF PETITION

Upon these facts we make the following contentions:

I. Petitioner had an absolute right to dismiss.

II. The contracts set out in the complaint, and upon which the claim is based, are contracts with the Fleet Corporation, not with the United States; therefore, the Court of Claims has no jurisdiction over either the original claim or the counter-claim growing out of such contracts.

III. After the order of dismissal and after plaintiff had commenced its new suit against the Fleet Corporation, the court was barred from proceeding in the original cause by Section 154 of the Judicial Code, and this is a matter of jurisdiction.

IV. Counter-claim can only be allowed against a claimant against the Government, and when petitioner took steps to secure a dismissal it was no longer a claimant.

V. The question of the remedy on claims arising under contracts made by the Fleet Corporation is a question of jurisdiction which gravely affects claimants who may pursue a remedy upheld as proper by this court. It is of the utmost importance that the rule of stare decisis be adhered to in such cases, and that therefore the decision of this court in the Sloan case be followed in all like cases.

VI. The order of the court in reinstating the case was wrongful and deprived petitioner of its right to trial by jury.

POINT 1

The petitioner, the Skinner and Eddy Corporation, had the right to dismiss its suit

There seems to be an almost unbroken line of authorities holding that the plaintiff in a suit has an absolute right to discontinue or dismiss his suit at any stage of the proceedings prior to verdict or judgment, as the case may be, unless prior to the filing of the motion to dismiss or discontinue the suit a counter-claim has been filed and even after a counter-claim has been filed, under circumstances similar to those shown in the case at bar.

Veazie vs. Wadleigh, 11 Peters 54.

Confiscation Cases, 7 Wallace 454. (See page 457 of the opinion.)

Barrett vs. Virginian Railway Company, 250 U. S. 473.

In this latter case this court said (page 476 of the opinion):

> "At the common law, as generally understood and applied, a nonsuit could be taken freely at any time before verdict if not indeed before judgment. The right is substantial." (Citing cases.)

In City of Detroit vs. Detroit City Railway Company, 55 Fed. 569, the Circuit Court of Appeals for that Circuit, through Judge Taft, reviews the cases and uses the following language:

> "It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, on payment of costs, was of course except in certain cases. Chicago & A. R. Co. vs. Union Rolling Mill Co., 109 U. S. 702, 3 Sup. Ct. Rep. 594. The exception was where a dismissal of the bill would prejudice the defendants in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind."

A few of the other cases on the same point are:

> Cowham vs. McNider, 261 Fed. 714.
> McCabe vs. Southern Railway Co., 107 Fed. 213;
> Youtsey vs. Hoffman, 108 Fed. 699;
> United States ex rel Coffman vs. Norfolk & W. Ry. Co., 118 Fed. 554;
> Pennsylvania Globe Gaslight Co. vs. Globe Gaslight Co., 121 Fed. 1015;
> Morton Trust Co. v. Keith, 150 Fed. 606;
> Thomson-Houston Electric Co. vs. Holland, 160 Fed. 763.

Petitioner's case is similar in facts and identical in principle with the case of McGowan et al. vs. Co-

lumbia River Packers Association et al., 245 U. S. 352 In that case, the plaintiff had filed his suit in the United States District Court for the State of Washington, upon the assumption that the land at a certain point underneath the Columbia River was within the State of Washington. The defendant had answered, and also filed a counter-claim. After this counter-claim was filed, the Supreme Court of the United States, in another case, rendered a decision, which held that this particular land was not within the State of Washington, but was within the State of Oregon, thus depriving the District Court for the State of Washington of jurisdiction over the land in controversy, although it still had jurisdiction over the parties. The plaintiff, therefore, after this decision was rendered, moved to dismiss his case. The motion was denied by the lower court. The case was tried and a judgment had in favor of the defendant upon its counter-claim. This decision was reversed by the Circuit Court of Appeals on the ground that the motion to dismiss should have been granted, and upon appeal to the Supreme Court, the Circuit Court of Appeals was upheld. The Supreme Court held that inasmuch as the plaintiff could not possibly recover in the suit what he had anticipated at the time he filed the suit, and had been put in an unexpected position, he had a right to dismiss the case, notwithstanding the fact that a counter-claim had been already filed.

The parallel between this case and the petitioner's in the Court of Claims is striking. When petitioner filed its suit in the Court of Claims, so far as there had been any decision on the questions involved, it had been held (a) by the Court of Claims in the College Point Boat case (Exhibit "A" to petition) that

anticipated profits could be recovered in cases against the United States similar to petitioner's; and (b) it had been held by the Federal Courts, with but few exceptions, that contracts of the Fleet Corporation were contracts of the United States. With these decisions to guide it, the petitioner sued the Government on the Fleet Corporation's contracts, assuming that they were Government contracts, and not only claimed anticipated profits, but claimed other items which in a suit against the United States, as the law is now firmly established, were properly claims for "just compensation" (such as the item of $906,416.26 claimed as loss on materials purchased for canceled ships—see Exhibit D, Volume I, page 11) upon which suit could only be brought after a determination as provided by the Acts of Congress.

After suit was filed, not only did the Court of Claims reverse its former decision in the College Point Boat case, but the Supreme Court of the United States, in the combined Sloan, Astoria, and Eastern Shore cases, 258 U. S. 549, established the law to be that under contracts with the Fleet Corporation similar to the Skinner and Eddy Corporation contracts, suit would properly lie against the Fleet Corporation, but not against the United States.

And in the Russell Motor case, this court decided that in cases of this character against the United States anticipated profits could not be recovered, but the remedy was for just compensation after the determination of the amount of such just compensation in the manner provided in the statute.

In the light of the above-mentioned decisions, it was obvious that petitioner had misconceived its remedy in two vital respects, first, under the Astoria decision

the suit was properly against the Fleet Corporation and not against the United States, and, second, even if properly against the United States, petitioner could not, under the Russell Motor case, recover in the suit filed either anticipated profits or just compensation, and, therefore, could not make any recovery at all. It, therefore, filed its motion to dismiss in the Court of Claims, and at the same time filed, or attempted to file, a praecipe for dismissal, this latter document being refused acceptance by the Clerk.

It was exactly so in the McGowan case, where the plaintiff, after the decision of the Supreme Court, found he could not recover what he had set out to recover, and therefore filed his motion to dismiss, which motion the Supreme Court held should have been allowed, notwithstanding the fact that a counter-claim was already on file. The McGowan case is therefore authority for holding in the present case that even if the Government had filed its counter-claim prior to the motion to dismiss, that nevertheless the motion to dismiss ought to have been granted. How much stronger is the right to dismiss when at the time the motion was made no counter-claim had been filed or offered.

POINT II

The contracts set out in the petition, upon which both the claim of petitioner and the counter-claim of the United States are based, are contracts with the Fleet Corporation, not contracts with the United States; therefore the Court of Claims has no jurisdiction over either the original claim or the counter-claim.

The jurisdiction of the Court of Claims is a limited jurisdiction covered entirely by the statute, and embraces only such subject matters as the statute covers. This jurisdiction is defined and limited by Section 145 of the Judicial Code, which is as follows:

> "Sec. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> "First. All claims (except for pensions) founded upon the Constitution of the United States, or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages liquidated or unliquidated in cases not sounding in tort in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States was suable. * * *
>
> "Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the Government in said court * * *."

It will thus be seen that unless the contracts, which are set out in full in the complaint and upon which

contracts both the claim of the petitioner and the counter-claim of the United States are founded, are contracts of the United States, then the Court of Claims has no jurisdiction of the subject matter of either the complaint or the counter-claim.

With this point in mind, let us examine the contracts which form the basis of the complaint, to determine whether or not these are contracts of the United States.

The first contract between these parties is dated May 28, 1917 (Record, page 45, Volume I). At that time the Act of June 15, 1917, had not been passed. The President had not yet been given authority to make such contracts, and it was not until the executive order of July 11th, delegating the Presidential authority to the Fleet Corporation, that the Fleet Corporation had any authority to represent the United States. So we find here these parties making a contract at a time when the Fleet Corporation must have been contracting for itself, for the reason it had no authority to contract for any one else, and, indeed, the contract does not in any manner even suggest that any one is to be bound by the contract except the Fleet Corporation. The words "representing the United States" are of course omitted from this contract.

This contract was modified by what was called a supplemental contract. This supplemental contract was made on the 16th of February, 1918, at a time when the Fleet Corporation had received its delegation of authority from the President, and this contract does use the words "representing the United States of America." (Record, page 58, Volume I.) This supplemental contract contains the following recital:

> "Whereas, on May 28, 1917, the parties hereto entered into a certain contract."

In other words, here is a recognition that the parties to this supplemental contract are the same parties that executed the original contract.

Throughout both the original and the supplemental contracts the word "Owner" is used to describe the Fleet Corporation. It is interesting to note that likewise in every contract between these parties the word "Owner" is used to designate the Fleet Corporation. The word "Owner" in the suplemental contract is used repeatedly throughout the contract to mean the same party that it meant in the original contract. For example, in the third paragraph (page 58) it is recited that the

> "• • • practice and detail incident to the plan of cost accounting necessitated by the terms of the original contract are delaying the *construction of said vessels for the Owner.*" (Italics ours wherever used in this brief).

Again, on page 61, paragraph "1" provides that the "Owner" will pay the purchase price of the ships, and paragraph "2" provides that •

> "Payments heretofore made by the Owner under the original contract will be credited • • •"

So it is conclusively established that the party designated in each of these two contracts as the "Owner" is one and the same person, and that person is the Fleet Corporation.

With this same point in mind, let us turn to the letter of May 11, 1918 (Record, page 236, Vol. I). One

of the principal parts of this contract provides for the lease and sale of a shipyard by the Fleet Corporation to Skinner and Eddy. The Fleet Corporation had just purchased this yard the preceding day. The contract of purchase is set out at page 239. In that contract of purchase there is nothing to indicate that the United States was the party purchasing the plant, the Fleet Corporation, according to the contract, being itself the purchaser. At that time—May 10, 1918—Congress had not authorized the President to purchase shipyards. The only authorization is found (40 Stat. L. 182) in sub-division "(d)" of the Emergency Shipping Funds provisions of the Act of June 15, 1917. That sub-division authorized the President as follows:

> "To requisition and take over, for use or occupation by the United States, any plant or any part thereof."

The word "requisition" does not mean to purchase by negotiation. This is made emphatic by the very next sub-division (sub-division "e"), wherein the President is authorized as follows:

> "To *purchase*, requisition or take over title to * * * any *ship*."

In the latter instance Congress did authorize either the purchase or requisition of ships, but carefully refrained from authorizing anything but the requisition of plants. This is made still more emphatic by the fact that Congress on November 4, 1918, amended this sub-division "(d)," which had previously authorized the President to requisition plants, by giving him also the power to *purchase* or otherwise acquire title to

plants, in addition to his previous power of requisition. (40 Stat. L. 1022.)

In view of this state of the law, and in view of the fact that the purchase contract itself does not even purport to be made on behalf of the United States, but on its face is made by the Fleet Corporation, it is, we think, fair to state that it must be concluded that the purchase of this yard was by the Fleet Corporation for itself.

This yard having been purchased, the Fleet Corporation the very next day agreed to sell it to Skinner and Eddy. This also it must have done in its corporate capacity for the reason that at that time no Congressional authority had been given either the President or the Fleet Corporation for the disposal of property. Congress did, however, on the 19th of July, 1919 (41 Stat. L. 181), more than a year after this yard had been sold, in the Sundry Civil Appropriation Act, provide that materials or plants

> "acquired by the United State Shipping Board Emergency Fleet Corporation may be disposed of as the President may direct."

It is fundamental that agencies of the Government cannot dispose of Government property except in accordance with some act of Congress.

This contract of May 11, 1918, is the foundation of by far the larger part of the dealings between the Fleet Corporation and this claimant. It provides for the construction of fifty ships at a contract price of almost $100,000,000.00, and it was contracts for some of these same ships which were afterwards canceled, and which gave rise to a large portion of plaintiff's claim. This contract is an indivisible contract. With-

out the contract to lease and sell the shipyard, the petitioner could not have undertaken to build the ships, because a large number of the ships were to be built in the yard so agreed to be leased and sold. It then follows that as the Fleet Corporation, representing the Government, had no authority to either lease or sell this yard, it must have been acting for itself and in its own corporate capacity, and not as a representative of the Government, when it made this contract.

Let us turn then to the formal contract for the thirty-five ships, which was made in pursuance of this letter, and examine this contract for the purpose of determining whether it was a contract of the Fleet Corporation or of the United States. This contract is selected because it is the largest contract, and typical of all the others. This contract was made on the 1st of June, 1918, in pursuance of the letter of May 11th, and provides for the building of the thirty-five ships. It is a contract

> "Between Skinner and Eddy Corporation, * * * (herein called the Contractor), and the United States Shipping Board Emergency Fleet Corporation, a corporation organized under the laws of the District of Columbia (herein called the Owner), representing the United States of America." (Record, page 270, Vol I.)

All of the obligations and undertakings on the part of the second party are set out as obligations of the "Owner." It is the "owner" that is to perform the entire contract, there being no obligation whatever on the part of any one else. It is agreed on page 272, paragraph "II," that the "owner" will pay the money for the ships. It is further agreed that the "owner"

shall inspect and, if satisfactory, accept the vessels. It is the "owner" that is to authorize extra payments for wages if men are employed on holidays; it is the "owner" that must pay additional freight rates, if any are incurred; it is the "owner" that shall have the right to make alterations; it is the "owner" that can, for certain reasons, excuse delay in the building of ships; it is the "owner" that may declare the contract forfeited under certain conditions; it is the "owner" (page 281) that agrees to pay a premium for deliveries earlier than the contract dates. And so through the entire contract every obligation on the part of the second party is expressed to be the obligation of the "owner." There is no obligation whatever on the part of the United States, unless the United States is itself the "owner" under the contract. It, therefore, becomes most important to determine who is meant by "owner."

We find on page 274 a provision that all defects that develop within six months after the vessel is accepted, shall be "repaired to the satisfaction of the *Director General* of the *Owner.*" The Fleet Corporation did have a Director General, but so far as we are aware, the United States has no such officer.

On page 278 it is provided that if the Contractor be delayed in the work by any act or neglect of the "Owner," or

> "by reason of alterations or additions by the Owner, or the commandeering by the United States Government of materials," or "by reason of instructions or orders given by the Owner or the United States,"

then the time of delivery shall be extended for an equivalent period. Here is a clear distinction between

the "owner" and the United States. Then it provided that no request for extension of time shall be considered unless the Contractor shall, in writing, within thirty days, notify the Director General of the "Owner."

On page 279 it is provided that the "Owner" may forfeit the contract if the progress made is unsatisfactory, but if the Contractor can show to the satisfaction of the Director General of the "Owner" reasonable industry and good faith, then the Contractor shall be allowed such opportunity to complete the work as the Director General of the "Owner" may deem reasonable.

On the same page it says that title to all vessels, so far as they have been inspected and approved by the "Owner," shall be in the United States, and the title to all material shall be in the "Owner."

On page 280 it is the Director General of the "Owner" that is to decide disputes.

On page 287 it is provided that the Contractor shall put in additional protection against espionage and acts of war. The contract says that the Contractor shall, at its own cost, provide such additional watchmen, guards, and

> "devices for the protection of its plant property, and of the work *in progress for the United States Shipping Board Emergency Fleet Corporation.*"

Again, on page 289, occurs this provision:

> "It is recognized in view of war conditions, that it may become necessary for the United States to exercise control over the manner and priority in which materials and equipment are obtained

under this contract. It is agreed between the parties hereto that if it is desired by the Owner and/or the United States, that all contracts and agreements for equipment and materials to be used under this contract shall be submitted to the Owner and/or the United States, and that any orders given to the Contractor by the Owner, or the United States with regard to such contracts and agreements, will be promptly complied with by the Contractor."

It is impossible to argue, after considering these provisions of the contract, that the Owner mentioned in the contract is other than the Fleet Corporation itself. This being established, we find it is only the Owner that has any obligations under the contract. The United States has agreed to do nothing. It is true that the title to the ships, according to the contract, was to be vested in the United States, but the United States has assumed no obligations under the contract. Every commitment, every promise, every undertaking, is a commitment, a promise, or an undertaking of the Fleet Corporation.

The Fleet Corporation was organized with a capital of $50,000,000, which was provided by Congress. With that money it could purchase and build ships without obligating the United States in any manner, and that is exactly what it did. (Witness the first contract with the Skinner and Eddy Corporation in this case.) The Emergency Shipping Fund provision of the Act of June 15, 1917, which appropriated some hundreds of millions of dollars for the purpose of building ships, provided (40 Stat. L. 183):

"That the President may * * * expend the money herein and hereafter appropriated, through

> such agency or agencies as he shall determine from time to time; *Provided*, that all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other monies of said Corporation are now expended."

The "other monies" of the Fleet Corporation were the $50,000,000 capital, which it could expend without obligating the United States. It is therefore apparent that, while Congress appropriated the money, it was expected that the Fleet Corporation would make its own contracts and be liable thereon in its own person. And that is apparently just what was done when the Fleet Corporation made this contract, because the contract nowhere attempts to bind the United States to do anything, or to obligate the United States in any manner, the only person being bound or obligated being the Fleet Corporation. This is what, we presume, Mr. Justice Holmes had in mind when he said in the Astoria case that

> "It was expected to contract and to stand suit in its own person whatever indemnities might be furnished by the United States."

Every question as to liability under these contracts is settled by the decision of the Supreme Court in the combined cases of Sloan Shipyards, Astoria Marine Works, and Wood, Trustee, 258 U. S. 549.

Having shown by the contracts themselves that they are not contracts of the United States, it is equally clear that this court has already passed upon this question and settled the status of such contracts as these and the entire question of liability under them, in its

decision in the combined case of Sloan, Astoria and Wood above cited. In that combined case, the court said (258 U. S. 565):

> "The Shipping Act contemplated a corporation in which private persons might be stockholders and which was to be formed like any business corporation under the laws of the District, with capacity to sue and be sued. The United States took all the stock, but that did not affect the legal position of the Company."

Also, at page 568:

> "We attach no importance to the fact that the second contract, alleged to have been illegally extorted, was made with the Fleet Corporation 'representing the United States of America.' The Fleet Corporation was the contractor, even if the added words had any secondary effect."

The foreging extracts are from that part of the opinion which deals with the Sloan case. It is to be noted that the expression occurring in this part of the opinion (p. 567),

> "The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act."

has reference only to the cause of action alleged by Sloan, which was a suit for equitable relief based in part on alleged tortious acts. There is no language in the subsequent part of the opinion dealing with the Astoria case or Eastern Shore case that intimates

any doubt about the party who is liable on contracts of this character.

In dealing with the Astoria case the Court analyzes the contract, and notes that it also contains the words, "representing the United States of America." It must be borne in mind that in this case the lower court had dismissed the case on demurrer on the ground that the contract sued upon was a contract of the United States, and therefore the District Court was without jurisdiction, the only remedy being in the Court of Claims. On error to this court this judgment was reversed on the ground that the contract was a contract of the Fleet Corporation and not a contract of the United States. This court said (p. 569):

> "Throughout the contract the undertakings of the party of the second part are expressed to be undertakings of the Corporation and it is this corporation and its officers that are to be satisfied in regard to what is required from the Iron Works. It is recognized that it may be necessary for the United States to exercise complete control over the furnishing of supplies to the Iron Works and it is agreed that if required by the Corporation 'and/or the United States' the Iron Works will furnish schedules, etc., etc. The whole frame of the instrument seems to us plainly to recognize the Corporation as the immediate party to the contract. The distinction between it and the United States is marked in the phrase last quoted. If we are right in this, further reasoning seems to us unnecessary to show that there was jurisdiction of the suit. The fact that the corporation was formed under the general laws of the District of Columbia is persuasive, even standing alone, that it was expected to contract and to stand suit in its own person, whatever indemnities might be furnished by the United States."

The issue in the Astoria case was whether the contract was a contract of the United States or a contract of the Fleet Corporation. The lower court held that it was a contract of the United States and therefore there was no jurisdiction in any court except the Court of Claims. But on appeal to this court, that decision was reversed in the decision above quoted, which holds squarely and unequivocally that the contract is a contract of the Fleet Corporation and not a contract of the United States.

In the last of the three cases, the Eastern Shore case (United States Fleet Corporation vs. Wood, trustee), the claim which was under consideration arose under a contract similar to that last described, made by that company with the Fleet Corporation, "representing the United States of America," to construct six harbor tugs.

By referring to the opinion of the Circuit Court of Appeals, 274 Fed. 893, we find that the contract in question was in every essential particular the same as the contracts in the case at Bar, namely, construction contracts for the construction of vessels, and entered into by the Fleet Corporation.

It appears from that opinion that the Fleet Corporation advanced to the Shore Shipbuilding Corporation under this contract $428,017.72, and that after the adjudication of bankruptcy the Fleet Corporation was compelled to expend $135,161.65 in order to complete and take delivery of the tugs. In no essential particular, therefore, did the claim differ from the claim asserted against Skinner and Eddy Corporation in the counter-claim under the contracts in the case at bar.

The opinion of the Circuit Court of Appeals, after referring to the powers conferred upon the Fleet Cor-

poration by the several acts of Congress and executive orders, says (274 Fed. 902):

> "We are told that a contract made in the name of a public agent will be construed to be a contract of the government and not of the agent. Huffcut on Agency (2d Ed.) p. 254. This is to lose sight of the fact that the Fleet Corporation contracted as a principal in its contract with the bankrupt. It designated itself throughout the contract as owner, and was careful to distinguish between itself as owner and the United States, and the debt due from the bankrupt under the contract is a debt due to it as a principal and *not to the United States.* * * * It follows, therefore, that a debt due to the United States Shipping Board Emergency Fleet Corporation from the bankrupt herein *is not in law a debt due to the United States.*"

The decision of the Circuit Court of Appeals was therefore placed clearly on the ground that the indebtedness was not one due to the United States but to the Fleet Corporation. This court affirmed the judgment, using the following language (258 U. S. 570):

> "The third case, as we have said, is a claim of priority in bankruptcy. It was asserted against the estate of the Eastern Shore Shipbuilding Corporation, in the District Court for the Southern District of New York, under a contract similar to that last described, made by that Company with the Fleet Corporation 'representing the United States of America' to construct six harbor tugs. The claim was presented by the Fleet Corporation in its own name, but was put forward by it as an instrumentality of the Government of the United States. It was denied successively by the referee, the District Court and the Circuit Court

> of Appeals on the ground that the Fleet Corporation was a distinct entity, and that, whatever might be the law as to a direct claim of the United States, the Fleet Corporation stood like other creditors and was not to be preferred. 274 Fed. 893. The considerations that have been stated apply even more obviously to this case."

The court therefore affirmed the judgment for the considerations just previously stated in the Astoria case. Those considerations were briefly: That the Fleet Corporation was the immediate party to the contract, and that it was expected to contract and to stand suit in its own person; so that the conclusion is unavoidable that this court did hold that the indebtedness was not one due the United States, but was one due to the Fleet Corporation. The contract in that case, in all its essential elements, was exactly like the contracts in the case at bar. The money which was sought to be recovered had been advanced in identically the same way, and when this court held that the money advanced in the Eastern Shore case was not a debt due to the United States, it necessarily settled also that the alleged indebtedness set up in the present counter-claim is not a debt due to the United States. Beyond question, therefore, this court, in deciding these three cases, definitely held not only that the Fleet Corporation is liable on such contracts, but also that the United States is not liable.

There is no ground for the claim that the decision of the Supreme Court in the Sloan-Astoria-Eastern Shore case is to be confined either to a decision

(1) That only the question of jurisdiction was determined, leaving open the question of substantial liability under the contract; or

(2) That it was determined that the Fleet Corporation is liable on such contracts but that the question of the liability of the United States was left undetermined.

As we have pointed out, while jurisdiction was discussed and considered, the decision on jurisdiction was placed distinctly upon the ground that the contracts are not contracts of the United States.

There is nothing in the opinion of the Supreme Court which in any way holds open the question of liability of the United States under these contracts. As above stated, the expression in the opinion of the court, "even if they might have sued the United States," occurs only with respect to the tortious acts in the Sloan case, and does not appear in that part of the opinion devoted to the other two cases where the contractural liability under the contract was involved. The expression in that part of the opinion dealing with the Astoria case that the Corporation "was expected to contract and to stand suit in its own person, whatever indemnities might be furnished by the United States," is not open to the claim asserted by counsel for respondents. The word "indemnities" was undoubtedly used in a very general sense, and was inserted because of the fact that in some general way the United States might be expected to "stand behind" the Fleet Corporation in view of the appropriations of money made to it, and which, under the Act of June 15, 1917, were to be "expended as other moneys of said Corporation."

Until the effort was made, after the decision of this Court in the Sloan, Astoria and Eastern Shore cases, to limit the effect of that decision so as to make it practically a moot decision, the claim had never been advanced that a contract made by a public agent in

behalf of the public authority could bind both the agent and the public authority. In the brief filed in behalf of the Fleet Corporation in the Sloan, Astoria, and Eastern Shore case, quoted in extenso in 258 U. S. 553, the proposition is asserted that "An agent of the government is not liable upon contracts made by him on its behalf." In support of this proposition, the Fleet Corporation cited Hodgson vs. Dexter, 1 Cranch 345, and other cases, which they will undoubtedly again cite. The question before the court was whether the contracts were those of the Fleet Corporation or of the United States. No one claimed that they were contracts of both entities. The determination of this court that the contracts are contracts of the Fleet Corporation necessarily excluded the claim that they are contracts of the United States, and as we have pointed out, the reasoning by which the conclusion was reached is fatal to the claim that both the Fleet Corporation and the United States could be liable upon the contracts.

Subsequent interpretation of the decision of the Supreme Court in the Sloan, Astoria, and Wood, Trustee (Eastern Shore) case, by Lower Courts.

(a) The interpretation of that decision by the several Circuit Courts of Appeals supports the position of petitioner, Skinner and Eddy Corporation.

U. S. vs. Matthews (C. C. A. 9th), 282 Fed 266.
U. S. Fleet Corporation vs. Banque Russo (C. C. A. 3rd), 286 Fed. 918.
U. S. vs. Wood, Trustee (C. C. A. 2nd), 290 Fed. 109.
Providence Engineering Corporation vs. Downey Shipbuilding Corporation (C. C. A. 2nd), 294 Fed. 641.

In The Providence Engineering Corporation vs. Downey Shipbuilding Corporation, 294 Fed. 641, decided by the Circuit Court of Appeals of the Second Circuit on November 5, 1923, the question of the status of contracts made by the Fleet Corporation "representing the United States of America" was directly involved. The claim was made that the United States, not the Fleet Corporation, was the real party in interest in a contract so made. This contention was denied by the Circuit Court of Appeals on the authority of the Sloan (and combined cases) decision, and it was held that contracts so made by the Fleet Corporation are solely the contracts of the corporation, the Court saying (p. 648):

> "That question is not now an open one in this Court in view of the decisions in the Supreme Court of the United States."

and citing the Lake Monroe, 250 U. S. 246; United States vs. Strang, 254 U. S. 491; Sloan Shipyards vs. United States Shipping Board Emergency Fleet Corporation, 258 U. S. 549, and United States Shipping Board Emergency Fleet Corporation vs. Sullivan, 261 U. S. 146.

Referring to the contention that under the Sloan decision the United States might have a cause of action as the real party in interest under contracts of this character because of the expression appearing in the opinion of the Supreme Court that "the Fleet Corporation was the contractor, even if the added words had any secondary effect," the Circuit Court of Appeals said (p. 658):

> "On contracts made by the Fleet Corporation acting merely as the agent of the Government, no action could be maintained by or against it on any contract so made."

The court then quotes from the decision of Mr. Justice Field in Sheets vs. Selden's Lessees, 2 Wall 177, 187, to the effect that where a deed is executed or contract made on behalf of a state by public officer duly authorized, "In such cases the state alone is bound by the deed or contract and can alone claim its benefits." And also referring to Parks vs. Ross, 11 How. 362, 374, where this court again made a similar ruling, the Circuit Court of Appeals concluded that no room exists for holding that the United States can be regarded as a party to such a contract in view of the decision of this court. The court said (p. 658):

> "What has been said makes it plain that the Fleet Corporation must be regarded as the real party to the contract and is the real party in interest. If the Fleet Corporation was not the contractor and simply made the contract on behalf of the United States, as its agent, then in accordance with the doctrine announced in Sheets vs. Selden's Lessees, and in Parks vs. Ross, the Fleet Corporation would not be responsible on the contracts it made as representing the United States. But as we have seen from the Astoria Marine Iron Works case, Supra, the Supreme Court holds that the Fleet Corporation is liable on its contracts even though in making them it uses the words 'representing the United States of America.' We see no escape from the conclusion that the United States is not the real party in interest under the three mortgages given by the Downey Corporation to the Fleet Corporation."

(b) The subsequent interpretation placed by the Supreme Court on the decision in the combined cases of Sloan Shipyards, Astoria Iron Works, and Wood, Trustee (Eastern Shore Corporation), 258 U. S. 549, is in accordance with the position here taken by petitioner.

U. S. Fleet Corporation vs. Sullivan, 261 U. S. 146.

U. S. vs. Wood, Trustee—U. S.—(decided by this Court November 19, 1923.

U. S. Fleet Corporation vs. Chase National Bank,—U. S.—(Certiorari denied by this Court March 3, 1924).

In the United States Shipping Board Emergency Fleet Corporation, Petitioner, vs. Chase National Bank (The Downey Shipbuilding case) this court on March 3, 1924, denied the petition of the Fleet Corporation for a Writ of Certiorari to review the decision of the Circuit Court of Appeals of the Second Circuit in Providence Engineering Corporation vs. Downey Shipbuilding Corporation, 294 Fed. 641, hereinbefore cited and discussed.

In view of the very extensive analysis made by the Circuit Court of Appeals in the Downey case of the opinion and holding of this court in the Sloan, Astoria and Eastern Shore case, 258 U. S. 549, and in view of the interpretation which it put upon that case, it is fair to assume that in denying the Writ of Certiorari this court approved that interpretation.

The allegation in the petition that these contracts were made on behalf of the United States is a conclusion of law contradicted by the contracts themselves, which are set out in full.

Having established that these contracts are contracts of the Fleet Corporation and not of the United States, it follows that the Court of Claims has no jurisdiction over such contracts and necessarily could not have jurisdiction over the counter-claim of the Government based on such contracts. It is true that we alleged in our petition in the Court of Claims that these contracts were made by the Fleet Corporation, representing the United States in behalf thereof. But this is not an allegation of fact, but a mere conclusion of law, which is contradicted by the contracts themselves, which are set out in full. No evidence could be offered to support such an allegation. It would be incompetent to ask the officers of the Fleet Corporation as to whether or not they intended to bind the United States when they signed the contract. The contract says that the Fleet Corporation shall pay for the ships; manifestly no evidence could be introduced to show that the United States and not the Fleet Corporation was obligated to pay. The plain positive terms of a formal written contract cannot be contradicted in any such manner. And when we alleged in our petition that these contracts were made by the Fleet Corporation in pursuance of the authority granted by Congress, and by it representing the United States and in its behalf, we were merely alleging a conclusion of law that is contradicted by the contracts themselves.

Of course, no mere conclusions of the pleader, saying that the contracts in question are contracts of the United States, can make them such. Gold Washing Co. v. Keyes, 96 U. S. 199, and innumerable other cases in this Court. The jurisdiction of the Court of Claims is limited by statute, and in order for that court to proceed, it must appear in the petition of the

claimant that the suit is based on contracts of the United States. In this case it affirmatively appears that the contracts alleged, under the definite holding of this court, are not contracts of the United States and the jurisdiction wholly fails.

POINT III

Court of Claims is Barred From Proceeding by Reason of Section 154 of the Judicial Code

Section 154 of the Judicial Code (36 Stat. L. 1138) is as follows:

> "Sec. 154. No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect of which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States."

It is apparent that this statute effectually prevents petitioner from prosecuting the case in the Court of Claims for the reason that it has filed suit against the Fleet Corporation to recover on a large number of the same items that are set forth in the petition in the Court of Claims. This course of procedure is apparently the correct procedure on contracts of this character, as is evident by the cases herein cited.

That this Section is a matter of jurisdiction, and therefore deprives the Court of Claims of the power to proceed with the case, is obvious from the nature of the powers given that Court. The Government of the United States is not liable to be sued except with its consent, and whatever limitations Congress places

upon that consent limits the court's jurisdiction to the full extent of such limitations.

In the case of the United States vs. Waddell, 172 U. S. 48, it was held that the six-year statute of limitations against the United States was jurisdictional.

In Finn vs. United States, 123 U. S. 227, the matter is argued at some length by the court. In that case a suit was brought upon a claim barred by the six-year statute. The court said (page 231 of the Opinion):

> "We are of opinion that the claim here in suit—although by reason of its character 'cognizable by the Court of Claims'—cannot properly be made the basis of a judgment in that court. As the United States are not liable to be sued, except with their consent, it was competent for Congress to limit their liability, in that respect, to specified causes of action, brought within a prescribed period. * * * The duty of the court, under such circumstances, whether limitation was pleaded or not, was to dismiss the petition; for the statute, in our opinion, makes it a condition or qualification of the right to a judgment against the United States."

And finally the court held that since the Government of the United States has assented to a judgment being rendered against it only in certain classes of cases, that any limitation upon the cases in which judgment could be rendered against it was a condition or qualification of the right to a judgment, and therefore extended to the powers of the court itself.

It is, therefore, certain that if the petitioner had asked the Court of Claims to reinstate the suit at the time the Government asked for such reinstatement, that the court would have had no power to have made such order, and it must necessarily be true, therefore,

that the court had no power to make such order on the motion of the Government, and its order restoring the case was an assumption of a power or jurisdiction which it did not possess. Moreover, the petitioner cannot appeal either from the order nor from a final judgment in the case, should one be rendered, because it is prohibited from doing so by this same Section of the Judicial Code.

> Corona Coal Co. vs. United States, decided by this Court January 7, 1924.

As petitioner cannot appeal either from the order nor from a judgment, it has therefore no remedy against the order complained of other than the writ prayed for in the petition herein.

POINT IV

Counter-claim by Government Can Only be Allowed Against a Claimant Against the Government

Section 145 of the Judicial Code (36 Stat. L. 1137) provides as follows:

> "Sec. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters: * * *
>
> "Second. All setoffs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said Court. * * *"

The language is perfectly plain. When a claimant moves for dismissal of a cause, he is no longer a claimant against the Government in said court, and there

is therefore no longer any jurisdiction in the court to receive, hear, or determine any such counter-claim.

The Constitution of the United States guarantees to its citizens the right of trial by jury in lawsuit involving claims of a legal nature. All statutes in any way limiting or qualifying such right must receive such reasonably strict construction as will give full effect to the constitutional guaranty. It is undoubtedly true that any claimant who comes into the Court of Claims and avails himself of the privilege of suing the Government, thereby waives the right to a jury trial on any claim which the Government may set up against him. But when a petitioner dismisses his claim prior to the assertion of the Government of any counter-claim, he ceases to be a claimant.

The notice to dismiss was notice to the court and to the Government that petitioner was no longer a claimant; that it claimed nothing in said suit.

The Court of Claims is not a court of general jurisdiction but a special statutory court. There are, therefore, no general presumptions in its favor in regard to jurisdiction. Undoubtedly the statute creating the court and defining its powers and jurisdiction is to receive a reasonable construction so as to reasonably carry out the purpose which Congress must have had in mind in creating the court. That purpose, however, is not to be lost sight of. That purpose was to create a court where the citizen may sue the Government. The primary, and practically the only purpose of the act is to afford to the citizen a tribunal where he may assert causes of action against the Government as to which without such court he would be remediless. This, as stated, is the only real object of creating the court. The section giving to the Govern-

ment the right to file a setoff is purely a dependent and subordinate clause intended to be defensive only and never offensive. It is a shield for the Government and not a sword. To hold, therefore, that the Government may sue in the Court of Claims a citizen who has taken the proper steps to get out of the court, and is no longer the wager therein of a claim against the Government, would be to give the court by judicial construction, a purpose and a power contrary to the obvious meaning of the act which Congress must have had in mind in establishing such a court.

When plaintiff filed its motion to dismiss its petition, and when this motion to dismiss was granted, and when the petitioner followed this dismissal by commencing a new suit against the Fleet Corporation, thus putting it out of its power to file or prosecute a claim against the United States, it ceased as effectually as possible to be a claimant against the United States. There can be no more effectual manner of ceasing to be a claimant than this, and to permit the Government now to file a counter-claim and to compel the petitioner to answer that counter-claim in the Court of Claims, is in effect, permitting the Government to file an absolutely new action against the petitioner in the Court of Claims, and to prosecute that action when the petitioner is barred from presenting its own case, even as to $3,130,433.46 which the Shipping Board allowed as just compensation.

POINT V

The Question of the Remedy on Claims Arising Under Contracts Made By the Fleet Corporation Is a Question of Jurisdiction Which Gravely Affects Claimants Who May Pursue a Remedy Upheld as Proper by This Court. It is of the Utmost Importance That the Rule of Stare Decisis Be Adhered to in Such Cases, and That Therefore the Decision of This Court in the Sloan Case be Followed in All Like Cases.

Whether a judgment may run against the Fleet Corporation or against the United States, the contractor is obliged to rely in any event upon a payment from the Treasury of the United States, which payment the Congress of the United States is free to grant or withhold. In any event, also, at least in cases involving large amounts, the law will be settled by the Supreme Court in each case.

In matters of jurisdiction which involve considerations of procedure and venue, as in all questions of practice, the most important consideration is that of stability and uniformity. The rule of stare decisis applies most forcibly, both on grounds of reason and authority, to questions of that character, as it is obvious that changing the rules of procedure or of venue may have the effect to defeat litigants having just claims who have relied upon the rules first announced and have brought their suits accordingly.

On May 1, 1922, the Supreme Court held that the remedy of the contractor under contracts made by the Fleet Corporation "representing the United States of America" is by suit against the Fleet Corporation in the courts of ordinary jurisdiction sitting in the respective localities where that defendant may be

found. Sloan and Combined Cases, 258 U. S. 549. Two years have elapsed since that decision.

As the Fleet Corporation was incorporated in April, 1917, and its main activities were exercised during the year or two next following, and contracts of the character here involved were numerous during that period, it is plain that the statute of limitations has already begun to run on many claims or many items arising under such contracts.

There is every just consideration, therefore, in favor of the adherence by this court to the rule announced in the Sloan (and combined cases) decision, upon which it is plain that many litigants having just claims have relied. If it were possible for this Court to hold now that the remedy on such contracts is by suit against the United States in the Court of Claims, no argument is needed to show the injustice that would necessarily result to many citizens who have acted and relied upon the definite holding of this Court that such contracts are contracts of the Fleet Corporation, and that a suit against that defendant is the remedy of the contracting citizen.

It is further to be noted that although the dissenting opinion in the Sloan (and combined cases) decision called the attention of Congress to the possible advisability of changing the rule as laid down in the opinion of the Court, that the remedy of the contractor is by suits against the Fleet Corporation in the several local common law courts, nevertheless Congress has made no enactment in any way changing or qualifying the rules of procedure and venue laid down in the opinion of the Court. The absence of Congressional action clearly indicates the desire of the law-making power that the remedy of the contractor should not be by suit against the Government in the Court of Claims,

but should be by suit against the Fleet Corporation as against ordinary private corporations. Congress has therefore definitely declined the suggestion of vesting the Court of Claims with jurisdiction to determine claims of this character.

POINT VI

Wrongful Order of Court Deprived Petitioner of Its Right to Trial by Jury, and Writ Asked Is Proper Remedy for This Wrong.

The only possible object in reinstating the case after once dismissing it is to allow the Government to file and prosecute its affirmative action against petitioner in the Court of Claims, and thus deprive petitioner of its right to trial by jury.

The Government could, of course, at any time file suit in the United States Courts other than the Court of Claims, and have it determined in such action whether the petitioner was or was not indebted to the Government in the amount claimed, or in any other amount, but on that issue and in that case the petitioner would have a right to trial by jury.

In the matter of Simons, 247 U. S. 231, where the lower court had transferred a certain cause from the law side of the court to the equity side of the court, thus depriving the appellant of the right to trial by jury, the court said:

> "If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake."

and the writ was granted requiring the lower court to restore the cause to the law side.

In Ex Parte Peterson, 253 U. S. 300, the lower court had appointed an auditor with instructions to make an investigation as to the facts, hear the witnesses, examine the accounts, and make a report. The plaintiff therein applied to the Supreme Court for a writ of mandamus and/or prohibition commanding the lower court to proceed with the trial in the regular way, and that it be prohibited from proceeding under the order. The Supreme Court said, page 305 of the Opinion:

> "It is insisted that the District Court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him and his report should be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the Circuit Court of Appeals; and that the writs prayed for may not be used merely to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was said in Ex Parte Simons, 247 U. S. 231, 239, 'be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by' a proceeding 'that ultimately must be held, to have been required under a mistake.'"

The Court then held that the order did not deprive plaintiff of his right to trial by jury, and therefore denied the writ.

In this case, as the order complained of was a wrongful order which deprived petitioner of its right to trial by jury, it should be dealt with by this Court now. It would be a great hardship if the plaintiff

should be compelled in the Court of Claims to defend against the Government's suit, going through months, and perhaps years, of taking testimony of innumerable witnesses, and long, complicated, and voluminous accounts examined and put in evidence, and then find that all this labor had been for naught because of the wrongful order of the court in reinstating the cause to permit the Government to file a counter-claim seven months after the original cause had been dismissed.

RESPONSE OF COURT OF CLAIMS

Since the foregoing part of this brief was written, we have received a copy of the response of the Court of Claims to the rule issued by this court. The response does not take away anything from the force of what has hereinbefore been said, but it does seem appropriate to reply briefly to the reasons advanced in the return as a justification of the order of the court, setting aside the original order of dismissal and allowing the United States to file a counter-claim.

The return sets out a number of details that were not called to the court's attention on the argument of the original motion to dismiss, the presumption apparently being that had such details been called to its attention, the court would have been justified in denying the original motion to dismiss, and was therefore justified in setting aside the order of dismissal when such details were brought to its notice.

It is our position that none of these details had any bearing whatever on the motion to dismiss. The points which were not called to the court's attention, according to the response, are as follows:

a) It was not shown that petitioner's claim had been presented to the Shipping Board on December 31, 1920, more than six months prior to the filing of petitioner's suit.

The answer to this is that the claim was not presented to the Shipping Board on December 31, 1920, but on December 28, 1920, it was presented to the Auditor for State and Other Departments, and by him later transmitted to the Shipping Board (R. page *43, Vol. II.*) It is true that on December 31, 1920, petitioner, at Seattle, handed to E. R. West, one of the counsel of the Shipping Board and Fleet Corporation, at request of West, a brief unsworn summary or recapitulation of petitioner's claim which had been filed with the Auditor for the State and Other Departments. (Record, pages 20 and 47-48-49, Volume II). The record of correspondence with the Fleet Corporation (Record, pages 44-47, Volume II) shows that petitioner considered the claim as being in the hands of the Auditor with whom it had been filed, and did not expect or desire the Shipping Board to pass on it. The presentation of petitioner's claim to the Shipping Board (brought about by the decision of the Court of Claims in the Meyer Scale case) was made March 29, 1922, nine months after petitioner's suit was begun in the Court of Claims. Even if these circumstances can be construed to be a presentation of the claims to the Shipping Board prior to the commencement of the suit, then that fact is immaterial because it is not *presentation* of the claim which the statute of June 15, 1917, requires as a prerequisite to filing suit, but a *determination* of that claim.

(b) It was not shown to the Court that an award of just compensation had been made by the Shipping Board on February 14, 1923.

The answer is that a determination of just compensation is required by the statute before a cause of action accrues, and a cause of action accruing after complaint filed cannot be made the basis of a judgment on a complaint filed before the cause of action existed.

(c) Attorney for petitioner did not mention that he had made a written request for a copy of the resolution of the Shipping Board fixing just compensation, nor that the Shipping Board had mailed him such copy, nearly a month before the motion to dismiss was filed.

The answer is that the determination of just compensation after suit, being immaterial, it is equally immaterial that petitioner's attorney asked for and received a copy of the resolution determining the compensation.

(d) It was not brought to the Court's attention that the complaint included certain other causes of action stated in the return to be "within the general jurisdiction of the court, under Section 145 of the Judicial Code, and not within the special jurisdiction respecting just compensation conferred by the Act of June 15, 1917, as amended by the Merchant Marine Act of 1920, 41 Statutes 989."

The answer to this is that both the attorney for the United States and the attorney for petitioner have made affidavit that the items now referred to by the court as being within its general jurisdiction, were presented and argued to the court on the hearing of the motion (Record, pages 24 and 38); but even con-

ceding that both attorneys are mistaken in this particular, then such fact could have made no difference in the ruling on the motion to dismiss, for the reason (even assuming the contracts in question to be contracts of the United States, which, as shown elsewhere in the brief, is incorrect as a matter of law) that the complaint on its face gave the United States enough credits to balance these items coming under the so-called general jurisdiction of the court. The result therefore was that petitioner, not being entitled to recover either anticipated profits or just compensation in the suit filed, could make no recovery at all, and was, under the case of McGowan vs. Columbia River Packers Assn., 245 U. S. 352, hereinbefore cited, entitled to dismiss, even had a counterclaim been already on file.

(e) It was not made to appear at the argument that the attorney representing the Government had been informed that the claim for just compensation had been "prosecuted" before the Shipping Board or that the Shipping Board had made an award thereon; also the court itself was not informed of these facts.

It is shown in the record that the Shipping Board itself, and numerous auditors and attorneys for said Board, including its chief counsel, knew of the award (Record, page 36, Vol. II.), and even if the Government's attorney who argued the motion did not know of the award, the award itself being immaterial because made long after the complaint was filed, it is immaterial whether the attorney for the Government or the court was informed concerning it.

(f) On April 30, 1923, at the time the Court made the order of dismissal, it had not information that the Shipping Board had made an award of just compensation.

This is largely a repetition of the previous point. The award itself was immaterial; therefore, it is immaterial that the court, when it ordered the dismissal did not know of the award.

Further, it is obvious that all of the details under this and the five preceding sub-heads, alleged to have been suppressed, were matters of public record either in the petition and other parts of the record in the Court of Claims, or in the files of the Shipping Board and Fleet Corporation. If any of such details could have had any bearing on the motion to dismiss, surely the attorney representing the Government had a duty at least equal with the attorney for petitioner, to make mention of such details.

General answer to all the aforegoing reasons given in the response to justify the Court of Claims order.

All the special answers we have just hereinbefore made to the various justifications set forth in the response filed herein are directed only to one point, and that is that under the circumstances of this case, petitioner would have been entitled to dismiss its case even after counter-claim had been filed. Where, as here, a plaintiff files suit upon a theory more or less justified, and afterwards it is determined by subsequent court decision that his theory is wrong and he cannot recover what he set out to recover, or as in this case, can make no recovery at all, in the suit filed, then he is entitled to dismiss even after counter-claim filed.

McGowan vs. Columbia River Packers Assn., cited at length under Point I. of this brief.

But before counter-claim a plaintiff has an absolute right to dismiss. (Point I., this brief.) Moreover, as both the original complaint and the counter-claim are based on contracts with the Fleet Corporation and not with the United States, the Court of Claims never had jurisdiction of either the complaint or the counter-claim. The only possible branch of the case which could ever come within the jurisdiction of the Court of Claims is that relating to just compensation. The contracts being contracts of the Fleet Corporation, the United States is not liable thereon. It is possible, however, that if these contracts were cancelled by the United States, then the United States might be liable for just compensation for cancelling Fleet Corporation contracts, under the Act of June 15, 1917. But to recover such just compensation, there must be a determination of the amount thereof, in accordance with the Statute, before the jurisdiction of the Court of Claims can be invoked.

Sec. 175 Judicial Code cited in response not in point.

The only other point we can find in the response in addition to those just mentioned, is that Section 175 of the Judicial Code, quoted in full on page 13 of the response, allows the Court of Claims to retain jurisdiction over all cases for two years after final disposition of such cases.

This section relates to one thing only, that is the granting of new trials and it is not apparent in what way the section is applicable to the present case, where no question of a new trial is involved.

Was Petitioner, when it filed suit against the Fleet Corporation, trying to escape the Government's counterclaim?

The court says in its response, that it seems probable that petitioner filed suit against the Fleet Corporation in Seattle to escape the counter-claim (p. 12, Response).

We have already pointed out that the United States could have filed at any time, and can now or at any time in future, file suit against petitioner in courts of general jurisdiction, so that any claim it may have can be established in such courts, there can therefore be no question of the Government losing its claim if it have one. But the Government cannot sue originally in the Court of Claims, nor can it, as is now attempted, use the Court of Claims as a court of general jurisdiction. If Congress had desired to give the Government the right to sue its citizens in the Court of Claims, it could easily have done so (provided it had made provision for a jury trial), but it has required the Government to go into other courts to maintain its suits. The only exception is that the Government may file a counter-claim against a claimant as provided in Section 145, Judicial Code.

Our filing suit against the Fleet Corporation grew out of our firm conviction that the Supreme Court of the United States has settled the proposition that under such contracts as are involved here, the Fleet Corporation is liable and the United States is not liable. In filing this suit against the Fleet Corporation, we were merely following the way this court has pointed out, and it is unfortunate that the Court of Claims should think our object was merely to escape the Government's counter-claim, an escape that is not possible

under any circumstances, for the reason that if the Government really has a claim, it has all the courts of the land (in which Congress permits it to sue) open to it.

Action of Court of Claims has created extraordinary hardship, from which petitioner is entitled to relief.

The action of the Court of Claims has placed the petitioner in a most unfortunate predicament. In order to defend against the Government's counter-claim, petitioner will be compelled, under Judicial Code, Section 154, to dismiss its suit now pending against the Fleet Corporation. Before there could be a determination in the suit in the Court of Claims, petitioner's cause of action against the Fleet Corporation would be barred by the statute of limitations. And if it should be finally held by this court, on appeal from the final judgment of the Court of Claims, that these contracts are not contracts of the United States, then petitioner would have lost its remedy, because the United States would not be liable, and the case against the Fleet Corporation would be barred. Under the ruling of the Court of Claims, petitioner is compelled to choose between allowing a judgment by default against it in the Court of Claims and allowing its cause of action against the Fleet Corporation to be barred.

We cannot use our own judgment of suing the Fleet Corporation without paying the heavy penalty of a default judgment in the Court of Claims on a counter-claim which gives no credit either for the amount due on ships which were delivered and not paid for, or for more than $3,000,000 just compensation to which the Shipping Board has determined we are entitled.

CONCLUSION

We have, we think, shown:

First: That petitioner had a right to dismiss its case in the Court of Claims;

Second: That the contracts are with the Fleet Corporation and not with the United States, and therefore not cognizable in Court of Claims;

Third: That after the Court had dismissed said case it had no power to reinstate it, being prohibited by Section 154 of the Judicial Code; and that petitioner cannot appeal either from the order allowing the counter-claim to be filed or from a final judgment in the case on account of said Section 154 of the Judicial Code, and therefore has no other remedy but the writ prayed for;

Fourth: That petitioner is not a claimant and therefore no counter-claim can be allowed against it, and the only effect of the order is to permit the Government to sue petitioner affirmatively in the Court of Claims and compel petitioner to defend against said claim while petitioner is barred from presenting its own case;

Fifth: That the whole matter has been settled by this Court in the combined Sloan, Astoria, Wood cases, and the doctrine of stare decisis should apply;

Sixth: That, in any event, the order was wrong and deprived petitioner of the right to trial by jury on the Government's affirmative case.

It is respectfully submitted that a rule absolute should be issued.

Louis Titus,
J. Barrett Carter,
Livingston B. Stedman,
George Donworth,
Attorneys for Petitioner.

COURT OF CLAIMS OF THE UNITED STATES

No. 34220

COLLEGE POINT BOAT CORPORATION

vs.

THE UNITED STATES

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the annexed (paged from 1 to 5, inclusive) is a true copy of the docket entries in the above-entitled cause, as the same appears of record in this Court.

[SEAL]

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court at Washington City this eleventh day of April, A. D. 1924.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

DOCKET ENTRIES

34220

COLLEGE POINT BOAT CORPORATION

vs.

THE UNITED STATES

BYNUM E. HINTON,
Attorney of Record.

Nov. 1, 1919. Petition and Exhibit "A" filed. Copies of petition and notice to defendant.
(Cancellation of contract for collision mats. Navy Department.)

Nov. 3, 1919. Power of attorney filed. Defendant notified.

Nov. 18, 1919. Printed copies of petition received. Copies (10) and notice to defendant.

Jan. 2, 1920. General traverse under Rule 34 filed. Parties notified.

Jan. 20, 1920. Call on Navy Department filed. Allowed as to copies of papers mentioned and call issued Jan. 24, 1920.

Feb. 13, 1920. Reply of Navy Department filed. Parties notified.

Feb. 24, 1920. Reply of Navy Department as to paragraphs 5, 6, and 7 to call of Jan. 24, 1920, filed. Parties notified.

March 11, 1920. Reply of Navy Department as to paragraphs 4 and 8 to call of Jan. 24, 1920, filed. Parties notified.

March 22, 1920. Depositions of H. W. Schroeder, Frank E. Hodge, Horace M. Bridgewater, William H. Taubert for claimant and Exhibit marked "claimant's No. 5" filed. Parties notified.

March 25, 1920. Deposition of H. W. Schroeder with Exhibits Nos. 1, 2, 3 and 4 for claimant filed. Parties notified.

March 26, 1920. Motion for call on the Interstate Commerce Commission filed. Overruled March 27, 1920.

May 28, 1920. Certified copies (2) of papers from Interstate Commerce Commisison filed by claimant. Defendant notified.

May 28, 1920. Claimant's evidence entered closed on notice book.

Sept. 10, 1920. Defendant's evidence entered closed on notice book.

Sept. 23, 1920. Claimant's request for findings of fact and brief filed. Copies (5) and notice to defendant.

Nov. 1, 1920. Defendant's objections to plaintiff's rerequest for findings of fact; defendant's request for findings of fact and brief filed. Copies (10) and notice to claimant's attorney.

Dec. 1, 1920. Claimant's objections to defendant's objections to claimant's request for findings of fact; claimant's objections to defendant's request for certain findings of fact and reply brief filed. Copies (5) and notice to defendant.

Dec. 14, 1920. Defendant's reply brief filed in open court. Copies and notice to claimant's attorney.

Dec. 14, 1920. Mr. George A. King, as amicus curiae, given leave in open court to file a brief.

Dec. 14, 1920. Mr. C. W. Maupin (attorney for Albert and J. M. Anderson, Mfg. Co., No. 34332) granted leave in open court to file a brief on the jurisdiction of the court.

Dec. 14, 1920. Argued and submitted on merits.

Dec. 14, 1920. Brief on the question of the jurisdiction of the court filed by Mr. Maupin.

Dec. 15, 1920. Brief of Mr. George A. King, as amicus curiae, filed. Copy and notice to defendant.

Jan. 3, 1921. Court filed an order requiring that certain papers be filed.

Jan. 4, 1921. Stipulation of counsel with letter dated December 30, 1918, attached filed pursuant to order of Jan. 3, 1921.

Jan. 8, 1921. Vouchers and cancelled checks filed by defendant pursuant to order filed Jan. 3, 1921.

April 4, 1921. Court filed findings of fact and conclusion of law. Judgment for plaintiff in the sum of $20,112.42. Opinion by Judge Booth, dissenting opinion by Judge Graham.

May 27, 1921. Claimant's motion for a new trial and brief in support thereof (original and printed copies) filed. Copies (5) and notice to defendant.

May 28, 1921. Certified copy of contract in support of motion for new trial filed. Defendant notified.

June 6, 1921. Plaintiff's motion for new trial to Law Calendar.

Aug. 15, 1921. Defendant's opposition to claimant's motion for new trial with brief in support thereof filed. Copies (5) and notice to claimant's attorney.

Oct. 17, 1921. Plaintiff's motion for new trial argued and submitted.

Oct. 24, 1921. Plaintiff's motion for new trial overruled.

Dec. 19, 1921. Court filed order (on own motion) vacating and setting aside order overruling plaintiff's motion for new trial.

Jan. 11, 1922. Defendant's motion to withdraw objection to new trial filed. Copy to claimant's attorney.

Jan. 16, 1922. Court filed an order allowing new trial, vacating and setting aside former judgment and withdrawing findings and remanding case to Calendar for further proceedings.

June 28, 1922. Deposition of Harold W. Schroeder for claimant and Exhibits attached Nos. A, B, C and D filed. Parties notified.

Sept. 13, 1922. Claimant's request for findings of fact and brief filed. Copies (5) and notice to defendant.

March 21, 1923. Defendant's objections to plaintiff's request for findings of fact; defendant's request for findngs of fact and brief filed. Copies (5) and notice to defendant.

April 3, 1923. Argued and submitted on merits.

April 26, 1923. Claimant's motion to file amended petition filed. Defendant notified.

April 30, 1923. Court filed order allowing amended petition to be filed.

April 30, 1923. Amended petition filed.

May 21, 1923. Court filed findings of fact and conclusion of law; judgment for plaintiff in the sum of $5,112.42. Opinion by Judge Booth.

June 25, 1923. Claimant's application for appeal is filed. Defendant notified. Allowed June 26, 1923.

July 5, 1923. Record on appeal delivered to attorney of record.

EX PARTE: IN THE MATTER OF SKINNER & EDDY CORPORATION, PETITIONER.

PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE COURT OF CLAIMS.

No. 28, Original. Argued, on return to rule to show cause, April 14, 1924.—Decided May 12, 1924.

1. The right of a plaintiff to dismiss a suit, if it exists, is absolute, independent of the reasons offered and not affected by concealment or misstatement of reasons. P. 93.

2. The rule of the federal courts at law and in equity governing the right of a plaintiff to dismiss without prejudice, should obtain in the Court of Claims. Pp. 92, 94.
3. A plaintiff in the Court of Claims may dismiss without prejudice when the Government has filed no counterclaim, and will not be prejudiced, legally, by the dismissal. *Id.*
4. Where a plaintiff, after dismissing its suit in the Court of Claims, began a suit in a state court against the Shipping Board on the same causes of action, which remained pending, *held*, that the subject matter was withdrawn from the cognizance of the Court of Claims by Jud. Code, § 154, and that it could not resume its jurisdiction by setting aside the dismissal retroactively. P. 95.
5. An order of the Court of Claims attempting to reinstate a dismissed case in plain violation of the plaintiff's right to dismiss it, and an effect of which would be to deprive the plaintiff of the right of trial by jury in a state court, may be corrected by mandamus. P. 96.

Writ absolute.

RULE on the Court of Claims directing it to show cause why it should not be required by mandamus, or by prohibition, to restore an order dismissing a suit, to set aside another vacating the first, and to abstain from attempting exercise of further jurisdiction in the case.

Mr. Louis Titus and *Mr. George Donworth*, with whom *Mr. J. Barrett Carter* and *Mr. Livingston B. Stedman* were on the brief, for petitioner.

The petitioner had the right to dismiss its suit. *Veazie* v. *Wadleigh*, 11 Pet. 55; *Confiscation Cases*, 7 Wall. 454; *Barrett* v. *Virginian Ry. Co.*, 250 U. S. 473; *Detroit* v. *Detroit City Ry. Co.*, 55 Fed. 569; *Cowham* v. *McNider*, 261 Fed. 714; *McCabe* v. *Southern Ry. Co.*, 107 Fed. 213; *Youtsey* v. *Hoffman*, 108 Fed. 699; *United States* v. *Norfolk & Western Ry. Co.*, 118 Fed. 554; *Pennsylvania Globe Gaslight Co.* v. *Globe Gaslight Co.*, 121 Fed. 1015; *Morton Trust Co.* v. *Keith*, 150 Fed. 606; *Thomson-Houston Elec. Co.* v. *Holland*, 160 Fed. 768; *McGowan* v. *Columbia, etc. Assn.*, 245 U. S. 352.

The contracts set out in the petition, upon which both the claim of petitioner and the counterclaim of the United States are based, are contracts with the Fleet Corporation, not contracts with the United States; therefore the Court of Claims has no jurisdiction over either the original claim or the counterclaim.

Every question as to liability under these contracts is settled by the decision of this Court in the combined cases of *Sloan Shipyards Corporation, Astoria Marine Iron Works*, and *Wood, Trustee*, 258 U. S. 549.

Action in the Court of Claims is barred by § 154 of the Judicial Code. *United States* v. *Wardwell*, 172 U. S. 48; *Finn* v. *United States*, 123 U. S. 227; *Corona Coal Co.* v. *United States*, 263 U. S. 537.

A counterclaim by the Government can only be allowed against a claimant against the Government. Jud. Code, § 145.

The question of the remedy on the claims arising under contracts made by the Fleet Corporation is a question of jurisdiction which gravely affects claimants who may pursue a remedy upheld as proper by this Court. It is of the utmost importance that the rule of *stare decisis* be adhered to in such cases, and that therefore the decision of this Court in the *Sloan Case* be followed in all like cases.

The wrongful order of court deprived petitioner of its right to trial by jury and the writ asked is a proper remedy for this wrong. *Ex parte Simons*, 247 U. S. 231; *Ex parte Peterson*, 253 U. S. 300.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck*, *Mr. Chauncey G. Parker*, *Mr. Henry M. Ward* and *Mr. George M. Anderson* were on the brief, for respondents.

The Court of Claims had jurisdiction of the suit and of the counterclaim. Jud. Code, § 145, par. 2. It is

therefore immaterial whether the counterclaim grows out of contract or tort; it may be pleaded with the same effect in either case. *Allen* v. *United States,* 17 Wall. 207; *McElrath* v. *United States,* 102 U. S. 426.

Whenever the Government pleads a counterclaim in the Court of Claims, it acquires a substantial right, and the plaintiff's right to dispose of his case in any way he may see fit is accordingly qualified. If the Court of Claims has no jurisdiction of a claim presented, the counterclaim follows the fate of the claim, and will be dismissed with it. *Baltimore and Ohio R. R. Co.* v. *United States,* 34 Ct. Cls. 484. But if the Court of Claims has jurisdiction of the claim, the counterclaim becomes part of the suit, and unless the United States consents to its dismissal, it must be prosecuted to a conclusion. *Huske* v. *United States,* 46 Ct. Clms. 35. The counterclaim, it is true, was not filed before the suit was dismissed, but notice of it had been given with a request to allow it to be filed. Under the statute the Government had an absolute right to file its counterclaim. There is no rule in the Court of Claims limiting the time within which a counterclaim may be filed.

This Court does not prescribe the rules of practice in the Court of Claims. It is therefore submitted that, in so far as the rules of the Court of Claims are not inconsistent with law, the Court of Claims must be presumed to know its own rules and to interpret them correctly. The applicable rule of law was settled many years ago in *Huske's Case, supra.* The point is also directly covered in *McElrath* v. *United States,* 102 U. S. 426.

Under the decisions and uniform practice of the Court of Claims, a claimant is not permitted to dismiss his claim except by order of the court made after due notice to the United States. It is not even essential that a counterclaim should be filed in order to permit the United States to prove offsets against the claimant. *Wisconsin Central*

R. R. Co. v. *United States,* 164 U. S. 190; *Huse* v. *United States,* 222 U. S. 496.

The Court of Claims had jurisdiction to reconsider and annul its order of dismissal. *Ayres* v. *Wiswall,* 112 U. S. 187; *Bronson* v. *Schulten,* 104 U. S. 410; *In re Metropolitan Trust Co.,* 218 U. S. 312; *Goddard* v. *Ordway,* 101 U. S. 745; *Ex parte Lange,* 18 Wall. 163.

Under Rule 90 of the Court of Claims, a motion for a new trial (other than those made under § 175, Jud. Code,) shall be filed within sixty days from the time the judgment of the court is announced.

By § 138, Jud. Code, the court holds one term each year beginning on the first Monday of December. A case may be reinstated after the term has expired for much less cause than seems to exist in this case. *Wetmore* v. *Karrick,* 205 U. S. 141; *Murray* v. *United States,* 46 Ct. Clms. 94; *McMillan* v. *United States,* 49 Ct. Clms. 379.

The provisions of § 154, Jud. Code, are matters of defense and cannot be invoked to deprive the Court of Claims of jurisdiction of a counterclaim.

This Court has repeatedly held that a new trial may be granted under § 175, Jud. Code, by the Court of Claims after a case has reached it on appeal, the appeal decided, and the mandate issued, the only limitation upon its jurisdiction being that the motion for a new trial must be filed within two years next after the judgment is rendered. *Belknap* v. *United States,* 150 U. S. 588; *In re District of Columbia,* 180 U. S. 250; *Fuller* v. *United States,* 182 U. S. 562; *Sanderson* v. *United States,* 210 U. S. 168.

A decision of the Court of Claims granting, upon motion of the United States, a new trial, while a claim is pending before it, or on appeal from it, or within two years next after the final disposition of the claim, cannot be revised in this Court. *Young* v. *United States,* 95 U. S. 641.

The remedy of the petitioner is not by mandamus or prohibition but by appeal from such judgment as the

Court of Claims may enter on the counterclaim. *Ex parte United States*, 263 U. S. 389.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is a petition for a writ of mandamus directed to the Court of Claims to restore its order of April 30, 1923, dismissing the suit of the Skinner & Eddy Corporation against the United States, and to set aside its order of November 28, 1923, vacating the order of dismissal, and to prohibit the court from attempting to exercise further jurisdiction in the case. The judges of the Court of Claims have made a response to a rule to show cause.

On June 15, 1921, the petitioner brought this suit against the United States in the Court of Claims for $17,493,488.97. The cause of action was based on balances alleged to be due for the construction of certain ships, for bonuses for advanced deliveries of others, and for extra labor, extra work, and repairs on other vessels, all for the United States. The principal part of the claim grew out of the cancellation of two contracts between the petitioner and the United States Emergency Fleet Corporation "representing the United States." The largest item of the claim was for anticipated profits on 25 vessels. On August 15, 1921, no plea, answer or notice of any counterclaim having been filed by the Government, a general traverse was entered by the Clerk of the Court under its Rule No. 34. No further pleadings were filed and no proceedings were had of any kind until April 11, 1923, when petitioner filed its motion to dismiss the suit without prejudice. The petitioner based the motion on the ground that it had begun its suit under the Act of June 15, 1917, c. 29, 40 Stat. 182, 183, as amended by § 2, par. c, of the Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 989; that, as interpreted by this Court, these acts required the claims to be first presented to the President

for him to determine the just compensation, prior to the filing of a suit, and that as this claim was not presented to the President, the Court of Claims had no jurisdiction. On April 12th, the Government moved to withdraw its general traverse and for leave to file its answer and cross bill. The motions were argued and on April 30, 1923, the court made an order granting the petitioner's motion and dismissed its petition.

On May 1, 1923, one day after the dismissal, the petitioner filed a suit against the United States Shipping Board Emergency Fleet Corporation in the state court of Washington at Seattle, on substantially the same causes of action as those sued for in the Court of Claims, but omitting certain phases of damages claimed, for $9,129,401.14.

On June 9, 1923, at the same term of the court, the Government moved for a reargument of petitioner's motion to dismiss without prejudice, and to allow the Government to file a counterclaim. The motion was inadvertently overruled October 22, 1923, but upon restoration and reargument, the order of dismissal was vacated and leave was given to the Government to file its counterclaim.

It is intimated on behalf of the Government that the reason given by the petitioner for its motion to dismiss in April, 1923, was not a genuine one. The petitioner offers that and others. Others are that under the decision of this Court in *Sloan Shipyards Corporation* v. *Emergency Fleet Corporation*, 258 U. S. 549, and *Emergency Fleet Corporation* v. *Sullivan*, 261 U. S. 146, it was doubtful whether under the contracts sued on a recovery could be had against the Government in the Court of Claims, and second, that it was doubtful whether under *Russell Motor Co.* v. *United States*, 261 U. S. 514, there could be any recovery for anticipated profits under the cancelled contracts which was the basis for nearly half of the claim.

We think this mandamus must be granted. At common law a plaintiff has an absolute right to discontinue or dis-

miss his suit at any stage of the proceedings prior to verdict or judgment, and this right has been declared to be substantial. *Barrett* v. *Virginian Ry. Co.*, 250 U. S. 473; *Confiscation Cases*, 7 Wall. 454, 457; *Veazie* v. *Wadleigh*, 11 Pet. 55; *United States* v. *Norfolk & Western Ry. Co.*, 118 Fed. 554.

It is ordinarily the undisputed right of a plaintiff to dismiss a bill in equity before final hearing. *McGowan* v. *Columbia, etc., Association*, 245 U. S. 352, 358. In *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 146, this statement of the rule in *City of Detroit* v. *Detroit City Ry. Co.*, 55 Fed. 569, was approved:

"It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, on payment of costs, was of course except in certain cases. *Chicago & A. R. Co.* v. *Union Rolling-Mill Co.*, 109 U. S. 702. The exception was where a dismissal of the bill would prejudice the defendants in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind."

Cowham v. *McNider*, 261 Fed. 714; *Thomson-Houston Electric Co.* v. *Holland*, 160 Fed. 768; *Morton Trust Co.* v. *Keith*, 150 Fed. 606; *Pennsylvania Globe Gaslight Co.* v. *Globe Gaslight Co.*, 121 Fed. 1015; *Youtsey* v. *Hoffman*, 108 Fed. 699; *McCabe* v. *Southern Ry. Co.*, 107 Fed. 213.

The right to dismiss, if it exists, is absolute. It does not depend on the reasons which the plaintiff offers for his action. The fact that he may not have disclosed all his reasons or may not have given the real one can not affect his right.

The usual ground for denying a complainant in equity the right to dismiss his bill without prejudice at his own costs is that the cause has proceeded so far that the defendant is in a position to demand on the pleadings an

opportunity to seek affirmative relief and he would be prejudiced by being remitted to a separate action. Having been put to the trouble of getting his counter case properly pleaded and ready, he may insist that the cause proceed to a decree.

We do not perceive in the circumstances of this case any such ground for making an exception to the general rule, as was shown in *Western Union Tel. Co.* v. *American Bell Tel. Co.*, 50 Fed. 662, 664, or in *City of Detroit* v. *Detroit City Ry. Co.*, 55 Fed. 569, or *Manufacturing Co.* v. *Waring*, 46 Fed. 87, or *Electrical Co.* v. *Brush Co.*, 44 Fed. 602, or in *Bank* v. *Rose*, 1 Rich. Eq. 292, or *Booth* v. *Leycester*, 1 Keen, 247.

Under § 145 of the Judicial Code, the Court of Claims is given jurisdiction to hear and determine all counterclaims on the part of the Government "against any claimant against the Government in said court." Under Rule 34 of that court, notice of such counterclaim must be filed within 60 days after the service of the petition on the Attorney General. In this case, no such counterclaim was filed and a general traverse was noted by the clerk. Eighteen months elapsed and nothing was done when the petitioner moved to dismiss without prejudice, and then the Government without proffering any actual counterclaim asked for leave to file one, objecting to dismissal. The case was dismissed but six months later it was restored and a counterclaim filed.

The Government had not when the case was dismissed given any time or expense to the preparation and filing of a cross bill or of the evidence to sustain it. It had not taken any action in respect to the cause which entitled it to say that it would be prejudiced by a dismissal within the meaning of the authorities. It suddenly was awakened by the motion to dismiss to the fact that by eighteen months' delay, it was losing a possible opportunity to litigate a cross claim in the Court of Claims and without a

jury. We think the same rule should obtain in the procedure of the Court of Claims as in federal courts of law and equity in respect to the dismissal of cases without prejudice.

But there is a special reason why the rule must be enforced in this case. By § 154 of the Judicial Code, it is provided that:

"No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States."

The day after the dismissal of this suit in the Court of Claims, April 30, 1923, the petitioner filed suit in a state court of Washington for something more than nine millions of dollars for the same causes of action as those sued for in the Court of Claims, except the claims for anticipated profits. That suit and the section of the Code just quoted necessarily prevent the petitioner from suing on those claims in the Court of Claims, and exclude its jurisdiction of them, because the Fleet Corporation which is sued in the Washington court was certainly acting or professing to act, mediately or immediately, under the authority of the United States. The jurisdiction of these claims by the Court of Claims having been parted with by the order of dismissal in April can not be resumed by a retroactive order of the subsequent November, in view of the restrictive provisions of § 154, which, by reason of the Washington suit, intervene and apply. *Corona Coal Co.* v. *United States,* 263 U. S. 537.

It only remains to inquire whether this is a proper case for the writ asked. Mandamus is an extraordinary remedial process which is awarded, not as a matter of

right, but in the exercise of a sound judicial discretion. Although classed as a legal remedy, in issuing it a court must be largely controlled by equitable principles. *Duncan Townsite Co.* v. *Lane*, 245 U. S. 308, 312; *Arant* v. *Lane*, 249 U. S. 367, 371. It would be a useless waste of time and effort to enforce a trial in the Court of Claims if we were, upon appeal, to find that the petitioner was unjustly deprived of his substantial right to dismiss his petition, as we should have to do for the reasons stated. Added to this is the consideration which has been regarded as furnishing a substantial ground for the extraordinary process of the writ that the petitioner by a denial of his right to dismiss in the Court of Claims will be deprived of a right of trial by jury in the state court of Washington. *Ex parte Peterson*, 253 U. S. 300, 305; *Ex parte Simons*, 247 U. S. 231, 239.

Writ absolute.
